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THE AWKWARD STATUS OF COLORADO REAL PROPERTY IN A DECEDENT'S ESTATE

BY WM. C. MCGEHEE*

I. INTRODUCTION

At common law, title to real property is said to pass instantly from one owner to the next. This concept of immediate passage of title to real property is a consequence of the abhorrence of the common law for a gap in the seisin and its insistence that title should never be *in nubibus*. Thus, when an owner of real property dies, title to that property vests immediately in his devisees or his heirs, depending on whether he died testate or intestate. The personal property of a decedent, however, vests in his personal representative for ultimate distribution to his legatees or next of kin. Actually, the person or persons in whom title to real property vests immediately on death may not be known definitely for weeks, or even months, if there is controversy or uncertainty as to the validity or meaning of a will, or if the identity, relationship, legitimacy or survival of purported heirs is in doubt. This delay often negates, in fact, the certainty which the common law purports to achieve by the theory of immediate vesting. The common law attempts to explain such delays by resort to a second theory, namely, that when the heirs or devisees are identified with centainty, the finding "relates back" to the date of death.

Devisees or heirs in whom immediate title to real property vested enjoyed all the privileges of ownership, free from any right of, or interference by, the decedent's personal representative. This isolation of the real property of a decedent from the administration of his estate has become increasingly undesirable and impractical for several reasons.[1] Foremost among these reasons are the changes which have occurred in the nature of real property itself and in the manner in which it is owned. We have changed from a society in which the usual situation was that of fee simple ownership of a residence or farm, occupied by the owner, to one in which it is common to find many different estates in the same piece of real property and multiple ownership of these estates. In the case of farms, ranches or other rural properties one now finds that the surface and mineral estates often are separately owned, in whole or in part. The mineral estate is frequently subject to an oil and gas lease or other mineral lease and these leases, in turn, give rise to working interests, royalty interests and sometimes overriding royalties. Mineral, leasehold and royalty interests are often owned in small fractions by many persons who invest in such interests in much the same way one invests in corporate shares. Similarly, the surface estate may be the subject of a number of interests,

* Member of the Denver firm of Gorsuch, Kirgis, Campbell, Walker and Grover.

[1] See Basye, *Abolition of the Distinction Between Real and Personal Property in the Administration of Decedents' Estate*, 51 ILL. BAR J. 214 (1962); *Efficient Administration of Estates*, 102 TRUSTS & ESTATES 902 (1963).

such as agricultural, grazing or timber leases, and rights of way for roads, ditches, reservoirs and pipe lines.

Equally complicated interests exist in urban real estate. Perhaps the most sophisticated real property interest yet developed is the ownership of a piece of air, exemplified by the condominium. Such an interest could well be termed "intangible real property," creating an interesting real property counterpart to the well recognized phenomenon of intangible personal property.

In addition, improved means of transportation and communication and the increasing availability of investment capital have given rise to more frequent instances of nonresident ownership of real property.

The increasingly complex nature of interests in real property, the fragmentation of ownership thereof, and the growth in nonresident ownership create many situations in which it is impossible or impractical for heirs or devisees to assume possession and management of real property upon the death of the owner.

The other major factor which militates against the isolation of a decedent's real property from the administration of his estate is the fact that in many instances, particularly since the imposition of death taxes, the personal property of a decedent is insufficient to pay death taxes, expenses of administration and other claims against the decedent's estate, thereby making it necessary to resort to the real property, or at least to the income therefrom.

For the reasons mentioned, many states, including Colorado, have passed statutes modifying the common law to the extent that real property which is within the jurisdiction of the probate court is made "subject to administration." Our statute which so provides states in pertinent part:

> Every personal representative, by virtue of his office, shall have power, and it shall be his duty to receive, take possession of, sue for, recover and preserve the estate, both real and personal coming to his attention or knowledge, and the rents, issues and profits arising therefrom. All of such property and the rents, issues and profits arising therefrom shall be assets in the hands of the personal representative for the payment of debts, widow's, wife's, orphan's or minor's allowance, expenses of administration and legacies, in accordance with the will and the preferences granted by law, to be administered under the direction of the court.[2]

The personal representative also is given statutory authority, where not otherwise authorized by will, to sell or mortgage real property "whenever it shall appear necessary or expedient for the best interest of any estate or the persons in interest therein, having due regard to the rights of all . . ."[3] subject, of course, to compliance with the statutory provisions relating to sale of mortgage of real estate.

Thus, while the Colorado statutes give personal representatives very substantial rights with regard to a decedent's real property, they do not purport to change the common law concept of im-

[2] COLO. REV. STAT. § 152-10-13 (1953).
[3] COLO. REV. STAT. § 152-13-6 (1953).

mediate vesting of legal title in the heirs or devisees; nor do they give the probate court any specific authority in a testate estate to decree the manner in which title to real estate has devolved under a will. This arrangement frequently places real property involved in a decedent's estate in an awkward status. It is awkward because, in moving away from the original common law concept of complete divorcement of real property from estate administration and in moving toward placing the devolution of real property under the control of the court and the personal representative, we have stopped half-way. We have given the personal representative most of the practical attributes of ownership, including the right to possession and income, but have left the legal title itself,

and the devolution of that title in the case of a will, exactly where the common law originally had it—outside the estate proceeding.

A discussion follows of problems which arise under the present posture of the law, closing with remedial proposals. The problems are divided into two categories: (1) Those relating to rights in, and responsibilities toward, real property during administration of an estate; and (2) title and conveyancing matters.

II. RIGHTS AND RESPONSIBILITIES DURING ADMINISTRATION

Certain questions arise at present concerning the right to occupy real property, the enjoyment of income therefrom and the responsibility for payment of taxes and expenses thereupon while the property is subject to administration. Some of them are interestingly illustrated by a 1959 Colorado case[4] involving an estate in which one of the assets was an apartment building productive of rental income. A life estate in this property had been devised by testator to his daughter, who received all rents from the apartment subsequent to his death. The daughter paid the taxes on the apartment for the year of testator's death, which taxes had been a lien at the time of his death, and then requested reimbursement from the estate for the taxes thus paid. The executrix refused, and litigation ensued. In its opinion upholding the executrix, the court pointed out that the daughter took title subject to any burdens or encumbrances existing at the time of testator's death and that since she had enjoyed the income from the property she should assume the burden of taxes.

The action of the devisee-life tenant in taking possession of the property and receiving the income therefrom was proper by common law standards. Her assumption of the burdens related to the property would simply be a counterpart to her assumption of the benefits. Since the tax lien in *Robinson v. Tubbs*[5] was a statutory lien, and not a lien created by the voluntary action of the testator, it would not, strictly speaking, appear to involve the common law doctrine of exoneration. However, in a case[6] decided in the year following the decision in *Robinson v. Tubbs* which properly presented the doctrine of exoneration for consideration, the Supreme Court of Colorado held that the doctrine had previously been rejected by *Robinson v. Tubbs*.

As implied in passing in the *Robinson* case, statutes making real property subject to administration have modified the common law by permitting the personal representative to receive income from real property during administration and have likewise shifted the burden for payment of taxes and other expenses. While the section making real property subject to administration does not, in so many words, require the personal representative to pay taxes, it has been judicially determined that payment of property taxes is encompassed in his duty to "preserve the estate."[7] The respon-

[4] Robinson v. Tubbs, 140 Colo. 471, 334 P.2d 1080 (1959).
[5] *Ibid.*
[6] Ambrose v. Singleton, 144 Colo. 303, 356 P.2d 253 (1960).
[7] Brown v. Commissioner of Internal Revenue, 74 F.2d 281, 285 (10th Cir. 1934); Kretsinger v. Brown, 165 Fed. 612, 614 (8th Cir. 1908).

sibility of a personal representative to see that taxes are paid is likewise implicit in that portion of the claims statute which provides that "wherever it may be necessary to preserve or protect the estate for the benefit of persons in interest, the personal representative may pay any tax, assessment or encumbrance without the filing of a claim; . . ."[8]

The general property tax law in effect until August 1, 1964, refers specifically to the duty of fiduciaries to list property and pay taxes thereon.[9] While the new general property tax law no longer requires owners to list real property[10] and contains no language regarding payment of taxes by fiduciaries, there is no reason to believe that the underlying responsibility of fiduciaries for payment of taxes has been altered.

The *Robinson* case indicates that if the personal representative had retained possession of the apartment property and the income therefrom, the real property taxes would have been paid out of the income. What if real property subject to administration is not productive of income? Is the personal representative still responsible for payment of taxes? Since the property is under the control of the personal representative and is available, if needed, for satisfaction of claims against the estate, and since the personal representative is charged with responsibility to protect and preserve the assets, the responsibility logically should remain with the personal representative.

If nonproductive real estate is part of the residuary estate, taxes on it may be satisfied out of other residuary assets. It has been held that taxes arising subsequent to the death of the tastator and paid during administration by the personal representative may be treated as expenses of administration.[11] However, if the real estate has been specifically devised and is not part of residue, may the real property taxes still be charged against residue as an expense of administration? If *Ambrose v. Singleton*[12] does not allow exoneration of specifically devised property as to liens existing at the death of testator, it is reasonable to think that the same philosophy would apply to taxes incurred subsequent to death. Thus, while the personal representative appears to be equally responsible for payment of taxes on real property subject to administration whether it is specifically devised or part of residue, the ultimate burden for taxes (and presumably other expenses) attributable to specifically devised real estate would still seem to fall upon the devisee.

The amorphous nature of rights in real property following the death of the owner also creates problems in the assessment of real property taxes. Because the identity of heirs or devisees may not be known for some time after the death of the former owner, and with or without the benefit of permissive statutes, assessments are made variously in the name of the decedent, the estate of the decedent, the heirs of devisees as a class, the personal representa-

[8] COLO. REV. STAT. § 152-12-12 (Perm. Supp. 1960).
[9] COLO. REV. STAT. § 137-3-23 (1953).
[10] Colo. Sess. Laws 1964, § 137-5-2.
[11] *Supra* note 8, at 285.
[12] *Supra* note 6.

tive, or to unknown owners. There is statutory authority in Colorado for assessment to "owners unknown."[13]

The present practice in Denver County apparently is to assess property in the name of an owner who may be deceased until such time as the assessor is given actual notice of his death or until such time as an instrument is recorded in the real property records of the county which indicates his death. Upon receiving such notice, the assessor then assesses the property in the name of the estate of the former owner until such time as someone notifies the assessor to assess taxes to him or until instruments are recorded evidencing the succession of title.

While not discussed in the *Robinson* case, it is probable that the executrix permitted the life tenant to receive income from the apartment *ab initio* because of the fact that there were ample additional assets of the estate to pay claims, death taxes and expenses of administration, making it unnecessary for the executrix to administer that property. Such a relinquishment of the right to to administer real property either at the outset or during the course of estate administration is, in effect, a partial distribution of the real property. Unfortunately, there exists no well-defined means by which real estate may be partially distributed during the course of administration. Although a statute was passed in 1959 which sanctions partial distributions to legatees or heirs,[16] there is considerable doubt whether this provision can be considered to include real property. The distribution made by the court on final settlement of an estate covers only personal property, on the theory that since title to real property vests immediately on death it is not part of the property which the court distributes. If the court does not distribute real property when an estate is closed, it seems to follow that it would not do so in a partial distribution.

One exception which emphasizes the foregoing generalization is found in a recent amendment to the statute governing the composition of the share of an electing spouse which provides that "Any order of court made pursuant to this section providing for the distribution of property shall be deemed to provide that any real property disposed of by the order shall vest in the distributee."[15]

Despite lack of apparent authority, the courts sometimes are willing to enter orders tendered by counsel, such as the following recorded decree which purported to effect a partial distribution of Colorado real property:

> Now on this day this matter coming on to be heard upon the petition of the executor, and the court being advised in the premises, the court finds that as to the following described real estate, to-wit: .....lying and situated in the County of....., State of Colorado and with respect to said real estate, this estate has been administered according to law and the orders of this court, and that, as respects the above described real estate, ample and proper provision has been made for creditors

[13] Colo. Sess. Laws 1964, § 137-5-2.
[14] COLO. REV. STAT. § 152-14-5 (Perm. Supp. 1960).
[15] COLO. REV. STAT. § 152-14-10 (Perm. Supp. 1960).

> of the estate, and for expenses of administration, and for all other persons in interest, and that it is in the best interests of said estate that the fiduciary be discharged as respects the said real estate, wherefore,
>
> IT IS ORDERED that....., executor, be and he is hereby discharged with respect to his rights to and responsibilities toward the above described real estate only, and that title to said real estate may henceforth pass in accordance with law as if final distribution had been made, and the final report herein filed and approved, and said fiduciary had been fully discharged.

Query as to the effect of that decree.

A personal representative or a court should be able to achieve a partial distribution of real property in the same way that a partial distribution of personality can be made. Statutory authority to do so should be clear enough to avoid any title questions related to such a partial distribution.

In the same realm as the questions of taxation and partial distribution previously discussed is the question of occupancy of a family residence during administration. Theoretically, the personal representative should charge rent to whomever occupies the property. One can readily imagine a widow's reaction to such a suggestion. The potential harshness of this situation is ameliorated to some extent by the statute giving the court authority to permit the spouse or minor children to remain in possession without payment of rent for such period and upon such terms as the court may deem just.[16]

It may be seen that the present posture of the law leaves some areas of doubt concerning the relative rights and responsibilities of personal representatives and heirs or devisees with regard to real property of an estate during the period of administration. Such doubts are best resolved by drawing wills which spell out with precision the rights and responsibilities of the parties during administration.

III. Title and Conveyancing Problems

The first title problem considered hereunder is the question of who can give a valid deed to real property which is subject to

[16] Colo. Rev. Stat. § 152-12-15 (1953).

administration. Ordinarily, the conveyance will be by executor's or administrator's deed and it is rare that the purchaser's attorney will require the joinder of the heir or devisee who, in theory, is the owner.

The ingenuity of the common law explains this seeming anomaly of conveyance by someone other than the holder of legal title by pointing out that the deed of the personal representative serves to divest the title of the heir or devisee and give it to the grantee. This, of course, has its parallel in other types of conveyance by public officials or officers of the court, such as sheriffs' deeds or deeds of court appointed trustees. It also has its parallel as to risk, if the personal representative thus conveying abuses or exceeds the authority granted in the will or fails to comply with necessary statutory requirements.

How about taking a deed from an heir or devisee while the property he "owns" is subject to administration? If the estate can be closed properly without resort to the property in question, the title conveyed was good. Until the estate is closed, however, there is at least the theoretical risk that title thus acquired will be divested by the personal representative.

The second question for consideration is whether a will or decree of heirship operates as an adequate muniment of title to real property which was not owned by the decedent at death, and which is taken in the name of the personal representative during administration. This situation could arise when a personal representative exchanges real property which was owned by the decedent for other real estate, when a personal representative purchases real property as an investment with funds of the estate or perhaps, in rare instances, when some third party gives or devises real property to the estate of the decedent so that the property can be handled as part of that particular estate. While it has been clear in Colorado that a will disposes of real property which a testator acquired after he excuted the will but prior to his death,[17] this carries the question one step further. The safest approach would be to have the personal representative convey title to the distributees at the appropriate time. However, suppose the estate has been closed and the personal representative has failed to do this. Should the estate be reopened for purposes of such a conveyance? If the personal representative has died in the meantime, should a successor fiduciary be appointed solely for this purpose?

It is hard to conjure any rationale under which a will or decree of heirship could be said to pass title to real property not owned by the testator at death. To apply the doctrine of after-acquired title to a testamentary disposition would be a perversion of that doctrine. Such an approach would fly in the face of the notion of

[17] Clayton v. Hallett, 30 Colo. 231, 70 Pac. 429 (1902). Note however, that the cited case relies upon statutory language similar to that found in COLO. REV. STAT. § 152-5-2 (1953). That section was amended in 1957. The present § 152-5-2 (Perm. Supp. 1960) omits the phrase appearing in earlier versions "which he or she has or at the time of his or her death shall have." It is improbable that the legislature intended to re-establish the common law rule that a will does not pass title to real property acquired after its execution, but it is arguable that the present statutory language has that result.

immediate vesting upon death. Further, it would produce an improper and unintended result in the situation where the personal representative uses personalty of the estate to purchase real property if the real and personal property do not pass to the same parties, and in the same proportions.

The final title problem treated here is the difficulty in establishing the devolution of title to real estate under a will which is not, in and of itself, a sufficient muniment of title. The insufficiency of a will as a muniment of title will be examined in two contexts: (1) Where a specific devise contains an inadequate legal description; and (2) where distribution of real property is discretionary with the executor.

Consider first a devise of residential property without a specific legal description, such as:

> I devise unto my wife all my right, title and interest in such real property and improvements thereon as she and I are using as our residence or residences at the time of my death, subject to any lien or liens existing against said property at the time of my death, if she survives me.

This type of devise need not be criticized, since many testators are likely to change their residence without thinking to change their will, in which case the devise might adeem if it set forth only the specific legal description of the former residence. Nevertheless, this type of will provision standing alone does not provide an adequate muniment of title. It is necessary to record an additional document which will establish the proper legal description of the property referred to by the general language in the will.

However, since title already was vested in the devisee and is not being divested, none of the instruments referred to conveys title, but is simply in explanation thereof. Perhaps that is enough. The trouble is that in the absence of an established and uniformly accepted practice the lawyer who handles the estate and the lawyer who later examines the title may not agree as to the proper method.

Consider finally a will in which the executor is given discretion to distribute real property in a disproportionate manner. For example, an estate might include mineral interests having considerable potential value but producing no present income. Such assets would not be particularly appropriate in a marital trust giving the surviving spouse a life estate with power of appointment.[18] The executor probably should distribute all of these mineral interests to other beneficiaries and avoid a proportionate distribution of them to the martial trust.

In another case, a testator might have as his equal beneficiaries a son who is in the ranching business in Colorado and a daughter living in another state. If the testator's estate includes Colorado ranch property, it very probably would make sense to satisfy the son's legacy with this type of interest and give the daughter cash, securities or other personal property which she could manage more easily.

It is in such situations, where the testator purposely refrains

[18] See U.S. Treas. Reg. § 20.2056(b)-5(f)(5) (1958).

from specifically devising real property by his will and in which an executor is given broad discretionary authority in the distribution of real estate, that the common law rule of immediate vesting in devisees seems farthest removed from both reality and desirability. In fact, if a subsequent disproportionate distribution of real property by the executor results in a theoretical "divestment" of interests previously vested, the resulting rearrangement of interest might be treated by the tax authorities as a taxable exchange.

Here again, the will alone is not an adequate muniment of title and one or more additional instruments must appear of record to set forth the actual devolution of title, such as a quit claim deed or assignment from one beneficiary to another, a decree, a deed or other instrument of conveyance by the executor, or perhaps a combination of several of these, none of which enjoys definite sanction. There is doubt whether the statute subjecting real property to administration or any other provision of the Colorado statutes gives a probate court authority to enter an order decreeing a disproportionate distribution of real property which is binding, particularly if such a decree is entered as a routine part of administration without special notice to the parties affected. As mentioned earlier, the schedule of distribution in a final report deals only with personal property and does not purport to distribute real estate, which is consistent with the common law theory. Although some of our probate courts will enter decrees purporting to dispose of real property when tendered by counsel, the effectiveness of such decrees is questionable at best.

IV. REMEDIAL PROPOSALS

It might be appropriate to consider one or two possible solutions to the problems which have been presented. The most drastic and perhaps the most effective solution would be to abolish completely the common law rule of vesting in heirs or devisees and provide, instead for vesting of legal title to real property in the personal representative. This would avoid the ambivalence now existing as a result of ownership by a devisee on the one hand and practical control by the personal representative on the other hand. All of the rights and responsibilities as to a decedent's real property would be centralized in the personal representative until such time as title was conveyed to the beneficial owner upon a partial or final distribution. The deed of the fiduciary then would be the principal muniment of title rather than a will or decree of heirship.

Although no state in this country is known to have adopted such a far-reaching statute, the statutory rule in England since 1897 has been that real property devolves upon the personal representative in the same manner as personal property.[19] England, the source of our common law, has frequently shown more flexibility than we in discarding or revising common law principles dissatisfying the needs of the time.

[19] Land Transfer Act, 1897, 60 & 61 VICT., c. 65, § 1, superseded by Administration of Estates Act, 1925, 15 GEO. 5, c. 23, § 1.

In the absence of statutory authorization, the same result could be achieved in an individual estate by an appropriate will provision vesting title in the personal representative. A provision appearing in a recent edition of Trusts and Estates is designed to accomplish this result:

> In the event that my wife survives me and there should be included in my residuary estate any interest in real estate, I direct that ownership of such interest shall vest in the first instance in my Executor, even though under applicable local law title would otherwise pass directly to the the devisee, and that my Executor shall make the division, allocation, and conveyance of the same and the net income therefrom between the trusts as above provided.[20]

A more limited solution is afforded by the Model Probate Code, which provides specifically for a decree of final distribution which, rather than the will, is to be the significant muniment of title and which is required to distribute by specific description every tract of real property which is subject to administration.[21] The Model Probate Code further provides that the decree is to be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, and requires that a certified copy of the decree "be recorded by the personal representative in every county . . . in which real property distributed by the decree is situated."[22] Such a decree would provide a more effective method of establishing the passage of record title than does a will supported by various other explanatory documents of questionable effect and effectiveness. The weakness of the Model Probate Code is that its retain the concept of immediate vesting in devisees[23] and, therefore, retains the same potential for confusion during the period of administration which exists under our present practice.

[20] Durbin, *Marital Deduction Formula Revisited*, 102 TRUSTS & ESTATES 545, 610-11 (1963).
[21] SIMES, MODEL PROBATE CODE § 183 (1946).
[22] *Id.* at § 183(e).
[23] *Id.* at §§ 84 and 124 and comment following § 124.

COLORADO'S NEW COURT SYSTEM

BY HARRY O. LAWSON*

I. INTRODUCTION

Amendment No. 1, adopted at the 1962 general election, repealed and replaced Article VI of the Colorado Constitution, providing for the state's judicial system. In addition, Amendment No. 1 repealed Article XIV, Section 11 of the constitution, which provided for justices of the peace and constables as constitutional officers. Most provisions of the new judicial article take effect on the second Tuesday in January, 1965. Consequently, it was necessary for the general assembly to pass implementing and corrective legislation during the 1964 session, no action having been taken during the 1963 session.

The legislation adopted during the 1964 session was drafted as the culmination of several months of study made by the Legislative Council Committee on Amendment No. 1, comprised of the members of the standing judiciary committees of both houses. Senator Carl Fulghum, chairman of the Senate Judiciary Committee, served as chairman,[1] and Representative William Myrick, chairman of the House Judiciary Committee, served as vice chairman. This committee was assisted by an advisory committee composed primarily of members of the bench and bar. During its deliberations, it held some 19 meetings, including 10 regional hearings.

The new judicial article and the implementing legislation provides Colorado with a significantly altered judicial system, as will be explained in the following sections.

II. NEW JUDICIAL ARTICLE PROVISIONS

A. Court Structure

The new judicial article provides that the judicial power of the state shall be vested in a supreme court, district courts, a probate court in the City and County of Denver, a juvenile court in the City and County of Denver, county courts, and such other courts or judicial officers with jurisdiction inferior to the supreme court as the general assembly may establish.

The supreme court, district courts, and county courts are retained from the previous article. Justice of the peace courts are eliminated as constitutional courts; the Denver juvenile court is given constitutional status; and the Denver probate court is created as a constitutional court. (The authority of the general assembly to establish other courts inferior to the supreme court was also contained in the previous judicial article.)

B. Original Jurisdiction

1. District Court.—The district court continues to be the trial court of general jurisdiction, with probate matters expressly in-

* Staff Director, Governor's Local Affairs Study Commission.

[1] Senator Fulghum also chaired the Legislative Council Administration of Justice Committee, which drew up Amendment No. 1.

cluded within the court's jurisdiction, except in the City and County of Denver where the Denver probate court is given this jurisdiction. The Denver juvenile court is given exclusive jurisdiction over juvenile matters within the city and county, and the probate court is given exclusive jurisdiction over mental cases within the city and county. In the rest of the state, juvenile and mental health jurisdiction would be in the district court under its general jurisdictional authority, unless the general assembly were to place this jurisdiction in the county court or in a new statutory court. Such jurisdiction could not be given exclusively to another court by the general assembly, however, but would have to be concurrent with the district court.

2. County Court.—The general assembly is given the authority to prescribe the jurisdiction of the county court within certain limits established by the new judicial article. County courts are barred from jurisdiction over felonies and civil cases in which the boundaries or title to real property are in question. The general assembly is also given the authority to provide simplified procedures in county court for claims not exceeding $500 and for the trial of misdemeanors.

C. Appellate Jurisdiction

The new judicial article provides that the supreme court shall continue to be the highest state court of review. The right of appellate review by the supreme court of final judgments of the district courts and the Denver probate and juvenile courts is also provided in the new judicial article. The general assembly is given the authority to establish the appellate jurisdiction of the district and county courts.

D. Other Provisions

1. Supreme Court.—The qualifications for supreme court justices have been changed to provide that a person shall have been licensed to practice law in this state for five years at the time of his election or selection. The previous requirement was that such person be learned in the law. The administrative authority of the supreme court over other state courts and the supreme court's rule making power are clarified in the new judicial article. The supreme court is also authorized to select a chief justice by court rule. Under the old judicial article, the position was a rotating one; the justice with the fewest years to serve in a regular term became chief justice for a 12-month period. The number of members of the supreme court may be increased from seven to nine upon request of the supreme court and approval by two-thirds of the members of each house of the general assembly. Generally, in other respects the provisions of the new and old judicial articles concerning the supreme court are similar.

2. District Court.—The eligibility requirements for district judges were also changed in the same way as for supreme court justices. Generally, the provisions of the old judicial article pertaining to judicial district boundaries and increases and decreases in the number of district judges were retained in the new judicial

article. These changes require a two-thirds vote of each house of the general assembly.[2] There were a few significant amendments and additions, however. Under the new judicial article, a district judge still may not have his office abolished during the term for which he was elected or appointed, but he may be required to serve in a judicial district other than his own, as long as such district encompasses his county of residence. Further, district court terms are to be established by court rule rather than statute, and separate divisions of the district court may also be established by court rule in the absence of statutory provision for court divisions.

3. *County Court.*—The general assembly is authorized to establish the qualifications for the office of county judge and the number of county judges in each county. Under the old judicial article, each county was allowed only one county judge, but an exception is made in the new judicial article for the City and County of Denver. It provides that the number, manner of selection, and term of office of the judges of the Denver county court shall be provided in Denver's charter and ordinances.

4. *Judicial Selection.*—Supreme court justices, district judges and county judges (Denver excepted) will continue to be elected under the new judicial article in the same way and for the same terms as they have in the past.[3] Judges of the Denver juvenile and probate courts must meet the same qualifications and shall be elected for the same terms as district judges.

The previous judicial article required that all district judges be elected at the same general election, with a similar provision applying to county judges. When a vacancy occurred under the old judicial article, the person appointed to fill the vacancy (or his successor) ran for election at the next general election for the remainder of the unexpired term. Under the new judicial article, the requirement that all judges of the same court be elected for full terms at the same time has been eliminated. The removal of this restriction makes it possible to elect for full terms in 1964 those additional district judges required to implement the new judicial article. The vacancy provisions have also been altered. Judges elected to fill future vacancies shall serve a full term rather than the remainder of the unexpired term. The net effect of these changes will be staggered terms of office, assuring continuity on the court and a reduction of the number of judicial positions appearing on the ballot at any one general election in multi-judge districts and counties.

III. LEGISLATIVE IMPLEMENTATION

During the 1964 legislative session, the general assembly adopted twelve measures which implemented the new judicial article.

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[2] Under the old judicial article, however, district boundaries could be altered by a majority vote of the general assembly as long as no new judgeships or districts were created. See *In re* Senate Resolution No. 9, 54 Colo. 429, 131 Pac. 257 (1913).

[3] The term for a supreme court justice is ten years, a district court judge six years, and a county court judge four years.

1. Senate Bill 1 dealt with the appointment and salary of probation officers and detention facilities for children.[4]

2. Senate Bill 2 established a juvenile court in the City and County of Denver.[5]

3. Senate Bill 3 established a probate court in the City and County of Denver.[6]

4. Senate Bill 4 provided for appeals from municipal and police courts.[7]

5. Senate Bill 5 provided for the jurisdiction of superior courts.[8]

6. Senate Bill 6 dealt with jurisdiction for forcible entry and detainer cases.[9]

7. Senate Bill 15, one of the two major reorganization bills, established the new county court, including number of judges, jurisdiction, and related matters.[10]

8. Senate Bill 19, the second of the two reorganization reform bills, established judicial district boundaries and the number of district judges.[11]

9. Senate Bills 27 and 28 eliminated references to justice of the peace courts and corrected references to district and county courts throughout Colorado statutes consistent with the implementing legislation. [12]

10. Senate Bill 20 increased certain docket fees.[13]

11. House Bill 1101 transferred Elbert county from the 4th judicial district to the 18th district. Under Senate Bill 19, Elbert County was retained in the 4th district.[14]

Following is a brief summary of the statutory provisions implementing the new judicial article.

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[4] Colo. Sess. Laws 1964, ch. 37.
[5] Colo. Sess. Laws 1964, ch. 46.
[6] Colo. Sess. Laws 1964, ch. 47.
[7] Colo. Sess. Laws 1964, ch. 100.
[8] Colo. Sess. Laws 1964, ch. 41.
[9] Colo. Sess. Laws 1964, ch. 53.
[10] Colo. Sess. Laws 1964, ch. 45.
[11] Colo. Sess. Laws 1964, ch. 42.
[12] Colo. Sess. Laws 1964, chs. 39 and 40.
[13] Colo. Sess. Laws 1964, ch. 52.
[14] Colo. Sess. Laws 1964, ch. 43.

A. COUNTY COURT

1. Jurisdiction.—The new county court will have concurrent original jurisdiction with the district court in civil actions (including torts) in which the debt, damage, or the value of the personal property claimed does not exceed $500, except when such cases involve the boundary or title to real property. The county court will also have concurrent original jurisdiction with the district court in petitions for change of name, the issuance of corrected or delayed birth certificates, and in cases of forcible entry, forcible detainer, or unlawful detainer, if the value of the monthly rental or the total damages claimed is less than $500.

The county courts will have concurrent jurisdiction with the district court in all misdemeanors and in the issuance of restraining orders affecting breaches of the peace and will also have jurisdiction in preliminary hearings and bindovers in felony cases, including the issuance of warrants.

2. Referees.—All other jurisdiction (including domestic relations, mental health, and juvenile cases) will be placed in the district court, except that district judges, in their discretion, may appoint county judges as referees in juvenile and mental health matters. County judges who serve as referees in juvenile and mental health cases will not receive additional compensation for this service, but any expenses incurred will be reimbursed by the district court. County judges who are designated as referees in other matters, however, will be entitled to the same compensation as the district judge might award any nonjudicial referee so appointed.

3. Simplified Procedure.—All civil cases brought in the county court will be tried under simplified civil procedure, as provided in Senate Bill 15. Parties to actions under simplified procedure may appear and act personally or may be represented by an attorney; provided that in claims involving accounts receivable or negotiable interests, parties to actions may be represented by an agent, except as limited by Colo. Rev. Stat. § 28-1-17 (1953).[15] Simplified criminal procedure (also provided by Senate Bill 15) will apply as to the means by which alleged offenders are brought before the county court. The trial and the disposition of criminal matters in the county court will follow the Colorado Rules of Criminal Procedure.

4. Number of Judges.—Except for the following exceptions there will be one county judge in each county. The number of county judges for Denver will be determined by charter and ordinances. Adams and Jefferson counties will each have three county judges; and Arapahoe, Boulder, El Paso, and Weld counties will have two judges each.

Also under Senate Bill 15, the offices of associate county judge and assistant county judge were created. Both offices will be elective, the judges being elected in the same manner, at the same time,

[15] COLO. REV. STAT. § 28-1-27 (1953) provides that "it shall be a violation of this article for anyone engaged in the collection business to appear before any court in towns or cities of 100,000 population or more unless represented by a licensed attorney. Further, no (collection agency) licensee shall render or advertise that it will render legal service, but any licensee may solicit claims for collection, take assignments thereof, and pursue the collection thereof."

and for the same term of office as the county judge. Associate county judges and assistant county judges will have the same qualifications as county judges.

Five associate county judges were authorized: one in Larimer County, to have his legal residence in Loveland; one in Montrose County, to have his legal residence in the western portion of that county; one in Garfield County, to have his legal residence in Rifle; one in Rio Blanco County, to have his legal residence in Rangley; and one in Morgan County, to have his legal residence in Brush. Associate county judges will receive one-half the annual salary of the county judge.

Three counties were authorized one assistant judge each: Larimer County, to have his legal residence in Estes Park; Moffat County, to have his legal residence in the southwest portion of that county; Eagle County, to have his legal residence in Minturn. Assistant county judges will receive one-fourth the annual salary of the county judge.

5. *Qualifications.*—The qualifications of lawyer county judges will be as presently provided by statute.

The following counties have full-time, lawyer judges: Class A county, Denver; Class B counties, Adams, Arapahoe, Boulder, El Paso, Larimer, Jefferson, Mesa, Pueblo, and Weld.

The following have part-time, lawyer judges and are designated as Class C counties: Alamosa, Delta, Fremont, Garfield, La Plata, Las Animas, Logan, Montezuma, Montrose, Morgan, Otero, Prowers, Rio Grande.

County judges in all other counties, designated as Class D, are not required to be attorneys, but are required to be at least high school graduates and to attend, unless excused, a training institute to be established by the supreme court. This institute will be held between election and the time the judge takes office. Expenses for attending the institute will be paid by the counties. Lawyer county judges elected to that office for the first time may attend the training institute at county expense.

In the ten largest counties, associate and assistant county judges (if such are provided) will have the same qualifications as the county judge. In the other twelve counties where lawyer judges are required, associate and assistant judges will be attorneys, if possible. If no attorney runs for the position, the associate or assistant judge must have the same qualifications as a nonlawyer county judge. In all other counties, an associate or assistant judge must have the same qualifications as a nonlawyer county judge.

6. *Salaries.*—With the exception of Denver county, county judges will receive the same salaries as are presently provided by statute.[16] County judges in the City and County of Denver will receive an annual salary of $12,000.

7. *Record Provisions.*—The county court will be a court of record, and a full record will be made of any county court case at the option of either litigant or upon the court's own motion. There will be no charge except for the preparation of a transcript, and

[16] Colo. Sess. Laws 1962, ch. 59, § 8.

indigent criminal defendants will receive records without charge. The court may determine the method by which the record is to be made, including the use of mechanical or electronic recording equipment.

8. Appellate Procedure.—Appeals from the county court will lie to the district court. The district court will review the case on the record and affirm, reverse, remand, or modify the judgment; provided that the district court may remand the case for a new trial with such instructions as it may deem necessary, or it may try the case de novo. Appeals from municipal court will be tried de novo in the county court. A record must be made if further appeal is to be taken to the district court. In Denver, municipal and county court appeals will lie to the superior court.

9. Court Administration and Procedures.—The county court will sit at the county seat and may provide by rule for hearings and trials to be held within the county at locations other than the county seat. In counties where associate or assistant judges have been provided, their place of holding court, if outside the county seat, has been specified by statute. In each county with more than one county judge, the court is required to designate a presiding judge by rule. If the presiding judge is not so designated, the supreme court departmental justice will name the presiding judge.

In counties requiring full-time, lawyer county judges, there will be a clerk of the county court and such additional employees as deemed necessary by the court. In Denver, the appointment of the clerk and his salary will be prescribed by city charter and ordinances. In Class B counties, the clerk will be appointed by the judge, who will also set the clerk's salary, subject to the approval of the board of county commissioners. In Class C counties, the clerk's salary is also subject to the approval of the commissioners, with a maximum salary of $4,800 per year. In the remaining counties (Class D), both the establishment of the position of clerk and salary are subject to the approval of the commissioners; however, the district court clerk may serve as the clerk of the county court with the concurrence of the judges of both courts. A consolidated clerical office may also be established in counties which do not require full-time, lawyer judges, if the judges of the district and county courts agree.

In counties where the county judge serves as his own clerk, he will be required to be bonded. In counties where the judge has a clerk, only the clerk will be required to be bonded. Terms of court will be established by court rule, with at least one term to be held annually.

10. Special Provisions Concerning the Place of Trial in Misdemeanors.—Normally, a defendant will be required to appear in a county court in the county in which the alleged offense took place; however, for convenience certain exceptions have been provided: (1) If the alleged offense is a traffic violation for which a penalty assessment ticket could be issued, the defendant may elect to appear in the county court of an adjoining county if such is more convenient. (2) For all other alleged misdemeanors, the offender may elect to be tried in an adjoining county, if the arresting officer and all other parties to the case agree. In counties of more

than 100,000 population, if the alleged offense takes place in the defendant's county or residence, the case must be tried in that county, the exceptions listed above notwithstanding. The county in which such cases are tried will bear the costs of such trials, but will receive any fees and fines (to the extent provided by law) resulting therefrom. More liberal bonding procedures in traffic violations have also been provided.

B. District Court

1. Judicial District Boundaries.—Several changes were made in judicial district boundaries. These changes include:

1. transfer of Douglas and Elbert counties from the 4th to the 18th judicial district;

2. division of the 6th district into two districts, the first to consist of Archuleta, La Plata, and San Juan counties (to continue as the 6th district), and the second to consist of Dolores and Montezuma counties (22nd district);

3. division of the 7th district into two districts, one to consist of Mesa county (21st district), and the other consisting of the remaining six counties in the district (to continue as the 7th district); and

4. division of the 8th district into three districts; Larimer and Jackson counties (to continue as the 8th district), Weld county (19th district), and Boulder county (20th district).

Figure 1 shows the judicial district boundaries as established by Senate Bill 19.

2.—Number of District Judges.—The number of district judges was increased from 41 to 69, with the 28 additional district judges

to be elected to full terms at the 1964 general election. Four districts (1st, 8th, 17th, and 18th) will receive an additional judge in 1969—to be elected at the 1968 general election. Table I shows the number of district judges.

3. Other Matters.—1. Geographic divisions of the district court were provided for three districts (3rd, 4th, and 11th) to assure that the population centers in each of these districts will have a resident district judge.

2. State aid to juvenile probation is continued at the present level, and juvenile probation services may be provided on an inter-district basis (as is presently provided for adult probation).

3. Contractural arrangements are permitted among counties or among judicial districts for juvenile detention facilities and services.

4. Legislation was passed (Senate Bill 24) to clarify the selection of directors of the Northern Colorado Water Conservancy District, because four judicial districts are now involved.[17]

C. CITY AND COUNTY OF DENVER

1. Probate and Juvenile Court.—The Denver probate court will have one judge, and the Denver juvenile court will have two judges; all three to be elected in 1964. The jurisdiction of the Denver juvenile court and the juvenile jurisdiction of district courts in other counties are similar.

2. Superior Court.—The superior court will have one judge whose qualifications, term of office, and salary will be the same as for district judges. Vacancies will be filled in the same way as vacancies in the office of district judge. The superior court will have appellate jurisdiction of county court and municipal court decisions and original civil jurisdiction concurrent with the district court from $500 to $5,000, and will be a court of record in all proceedings.

D. DOCKET FEES

Major changes in docket fee amounts and fee distribution are as follows.

1. The fee in traffic cases will be $5 rather than $4.

2. The plaintiff's docket fee in district court civil cases will be $20 instead of $15; and the defendant's fee will be $10 instead of $7.50.

3. Fees from all cases docketed in district courts will be divided, with 90 percent retained by the county in which the case is filed and 10 percent to the state. At present, the state receives 30 percent of the fees from cases docketed in district court, and the counties retain the other 70 percent.

4. The answer fee in civil cases in the new county court will be $5; the present justice court answer fee is $2.

5. Probate fees will be increased for estates in excess of $50,000.

[17] Colo. Sess. Laws 1964, ch. 101.

TABLE I

NUMBER OF DISTRICT JUDGES BY JUDICIAL DISTRICT

District[a]	Present No. of Judges[b]	Additional Judges to Take Office in 1965	Total	Additional Judges to Take Office in 1969
1st	3	2	5	1
2nd	10	4	14	....
3rd	1	1	2	....
4th	4	2	6	....
5th	1	....	1	....
6th	1	1	2	....
7th	1	1	2	....
8th	1	1	2	1
9th	1	1	2	....
10th	2	2	4	....
11th	1	1	2	....
12th	2	....	2	....
13th	2	2	4	....
14th	1	....	1	....
15th	1	1	2	....
16th	1	1	2	....
17th	2	2	4	1
18th	2	2	4	1
19th	1	1	2	....
20th	1	2	3	....
21st	1	1	2	....
22nd	1	....	1	....
TOTAL	41	28	69	4

a. As established by Senate Bill No. 19.

b. Prorated in those districts where boundaries were changed or where new districts were created from the old.

FIGURE 1

JUDICIAL DISTRICTS OF COLORADO (Effective January, 1965)

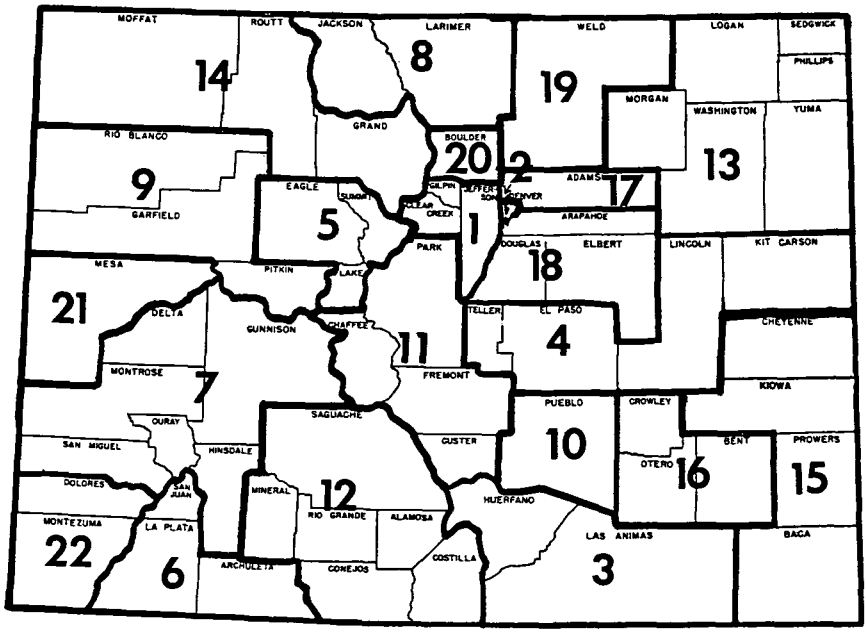
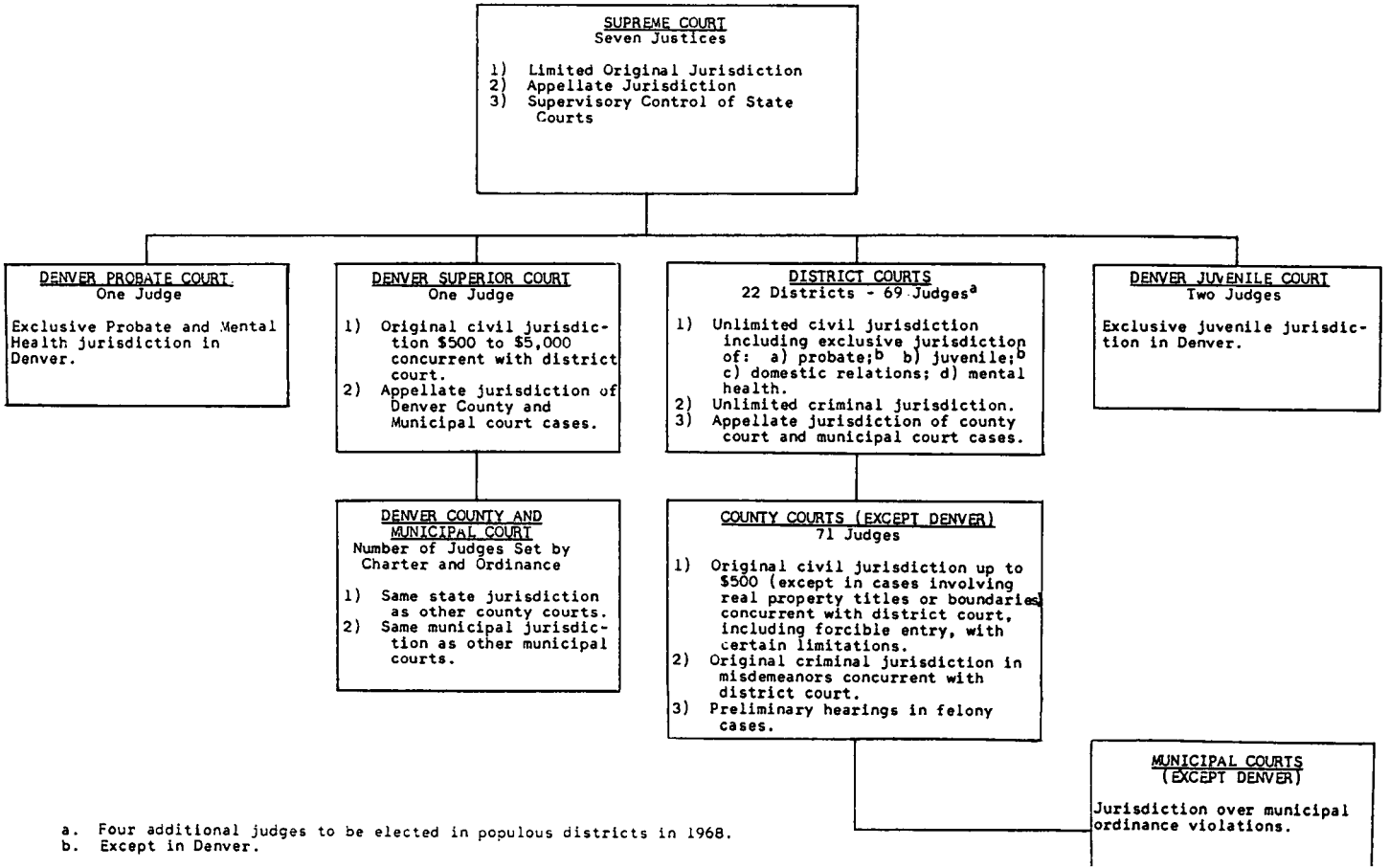


FIGURE 2

Colorado Court Structure Under New Judicial Article And Statutory Implementation



a. Four additional judges to be elected in populous districts in 1968.
b. Except in Denver.

PRIVATE CORRESPONDENCE UNDER THE MAIL OBSCENITY LAW

BY F. MICHAEL LUDWIG*

I. INTRODUCTION

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . . is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter . . . .[1]

It is not the purpose of this paper to challenge the constitutionality of the statute since it is well settled that obscenity is not protected by the First Amendment. One of the recent expressions of this point was made in the now famous case of *Roth v. United States*.[2] Mr. Justice Brennan stated in reference to the protection of the First Amendment;

> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.[3]

Instead of attempting to weave a thread among all the various expressions of what is obscene and what is not, the test developed in the *Roth* case will be the one referred to throughout the discussion which follows. The test is that "Obscene material is material which deals with sex in a manner appealing to prurient interests."[4] In this approach the court adopts the definition of the Model Penal Code.[5] The recent case of *Manual Enterprises Inc. v. Day*[6] may have narrowed the test somewhat since two of the Justices would tighten the test for condemning obscenity by requiring that the condemned material be both appealing to the prurient interest and patently offensive to the sensibilities.

The basic aim of this paper is narrow, in that it attempts to show the impropriety of judging the obscenity of a private letter

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* June graduate, University of Denver College of Law.

1 18 U.S.C. § 1461.

2 Roth v. United States, 354 U.S. 476 (1957).

3 *Id.* at 484. (Footnote of the Court omitted.)

4 *Id.* at 487.

5 § 207.10 (tentative draft No. 6, 1957).

6 370 U.S. 478 (1962).

by the "average person" test announced in the *Roth* case. Justice Brennan, using the instruction given in the lower court, set out the test:

> [T]he test is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved . . . .
>
> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community.[7]

The spectre of the "average man" arises in still another area of the law.

A brief outline of the private letter in the law of obscenity will be given, followed by a brief discussion of the elements necessary to sustain a conviction. Finally, the "average person" test will be shown in its application to private correspondence in the light of cases decided before and subsequent to the *Roth* case.

II. History of Title 19 U.S.C. § 1461

The statute under which prosecutions are initiated is the famous Comstock Act which was first enacted in 1865.[8] The funda-

[7] Roth v. United States, *supra* note 2, at 490.
[8] Act of March 3, 1865, ch. 89 § 16, 13 Stat. 504.

mental language of the act remained substantially unchanged until at the insistence of Comstock himself it was rewritten and reenacted in 1873.[9] Minor amendments followed but nothing affecting private communication appeared until title 18, section 334 of the United States Code was adopted. This section contained the word "letter" and led to the first case problem involving private communications of an obscene nature. In 1955 the act was amended again and the word "letter" was removed and "matter" was substituted in its place.[10] The intent of the legislature was not to limit the purview of the statute but rather to extend it.[11] The removal of the word "letter" from the act was of no great significance since, as will be shown, the courts have no difficulty finding private letters, as well as other letters, subject to the act in its present form. The intent of the revision, which can be gathered from many sources,[12] is to protect the public morals by eliminating all obscene matter, private or otherwise, from the mails of the United States.

The history of the private letter under the original act is one of judicial confusion as to whether such a document was subject to the restraint of the statute. In the late 1800's many lower federal court cases held that private letters were not to be included under the statute.[13] At the same time, however, there were an almost equal number of cases in which the courts held that the statute was meant to include private letters.[14] The only Supreme Court case to deal with the problem arose under 18 U.S.C. § 334, the act which included the word "letter."[15] The Court answered the question in a magnificent fashion, refusing to hold whether the term "letter" included private communication. Finally, in the year 1896 the Supreme Court was faced with the question again.[16] The Court was asked to reverse a conviction of one Andrews for mailing two obscene letters to a specific addressee who, interestingly enough, was an agent of the post office. The agent had seen an advertisement placed by the defendant and answered it using an assumed name. The letters were in response to his solicitation. The court faced the private correspondence question and answered it as follows:

> Owing . . . to the doubt thus suggested, it was held in several of the lower courts that the word 'letter,' thus introduced into the statute, must, in the light of other words used, be deemed to be some sort of a publication, and not merely private sealed letters. [Citations omitted.]
>
> However, any doubt there may have been as to the

[9] Act of March 3, 1873, ch. 258, 17 Stat. 598.
[10] 18 U.S.C. § 1461.
[11] 2 U.S. Cong. & Admn. News 84th ch. 1955, p. 2210.
[12] *Ibid.*
[13] United States v. Jarvis, 59 Fed. 357 (N.D. Wash. 1894); United States v. Warner, 59 Fed. 355 (N.D. Wash. 1894); United States v. Wilson, 58 Fed. 768 (N.D. Cal. 1893); United States v. Durant, 46 Fed. 753 (E.D. S.C. 1891); United States v. Clark, 43 Fed. 574 (S.D. Iowa 1890).
[14] United States v. Ling, 61 Fed. 1001 (Conn. 1894); United States v. Nathan, 61 Fed. 936 (N.D. Iowa 1894); United States v. Martin, 50 Fed. 918 (W.D. Va. 1892); In re Wahll, 42 Fed. 822 (Minn. 1890).
[15] United States v. Chase, 135 U.S. 255 (1890).
[16] United States v. Andrews, 162 U.S. 420 (1896).

> proper meaning to be given to the word has been removed by the case above cited, *Grimm v. U.S.*, where mailing a private sealed letter, in an envelope on which nothing appeared but the name and address, but containing obscene matter, was held to be an offense within the statute.[17]

Since this case, the private letter has been held to be within the meaning of the statute. It would be a wasted argument to attempt to show otherwise. The quarrel is not with its inclusion under the statute but with the test applied to determine a letter's obscenity or lack of it.

III. The Elements of Scienter and Motive Under the Statute

Before approaching the problems posed by the "average person" test, it is necessary to point out certain elements which are necessary for a conviction under this statute. The fundamental problem to confront the court in applying the statute has been that of scienter. What actual intent or knowledge must the accused have to be guilty under the act? That issue came before the Supreme Court in 1896 by virtue of a prosecution under Revised Statutes section 3893. The case involved a man by the name of Rosen who was accused of mailing a newspaper which contained photographs of females partially obscured with lampblack. Any recipient with a little effort and the price of a piece of bread could, by erasure, eliminate all doubt as to the models' physical attributes. The defendant contended that the indictment was defective because it charged him only with wilfully, unlawfully, and knowingly depositing the newspaper in the mail. He maintained that he must be charged with knowledge that the contents of the newspaper were obscene. The Court answered his contention in this fashion:

> Of course he [the defendant] did not understand the government as claiming that the mere depositing in the post office of an obscene, lewd, and lascivious paper was an offence under the statute, if the person so depositing it had neither knowledge nor notice, at the time, of its character or contents. He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited.[18]

The accused is not required by the above language to know that the contents are obscene, all he need know is what is in fact contained. After the *Rosen* case the lower courts abided by this theory on scienter. In 1906 the same question was presented to an appeals court.[19] The case involved a conviction under the same statute as in the *Rosen* case. The defendants were accused of mailing out a booklet of 308 pages of lewd and obscene matter. The defendants moved for an acquittal contending that the facts were not sufficient to show that they did in fact mail the books. The court disposed of this contention by holding the partnership agreement of the defendants was sufficient to indicate that the intent was that

[17] *Id.* at 424.
[18] United States v. Rosen, 161 U.S. 29, 33 (1896).
[19] United States v. Burton, 142 Fed. 57 (8th Cir. 1906).

the books would be mailed. The court felt this was sufficient to bring the defendants within the purview of the statute. A ninth circuit case decided in 1953 clearly states the scienter requirement.[20] This was an appeal from a conviction under 18 U.S.C. § 1461 for mailing a book called the "Arabian Love Manual." The defendant attempted to place his attorney on the stand to testify that the book was brought to the attorney who advised the defendant that it was legally mailable. The appellate court sustained the lower court's ruling as to the inadmissibility of this testimony. Citing the *Rosen* case as the leading authority, the court said: "There the defendant unavailingly asked the court to instruct the jury that he should be acquitted if they entertained a reasonable doubt whether he knew the publication he had placed in the mail was obscene."[21] The court then pointed out that on the authority of the *Rosen* case the defendant's contention was untenable.[22]

Probably the leading case on scienter is *Smith v. California*.[23] However this case involved a city ordinance which attempted to impose strict liability on sellers of lewd books. The case has no direct bearing on 18 U.S.C. § 1461, and will not be further discussed than to say that all drafters of local obscenity ordinances should study its ruling.

In a recent California case, the court in one sentence disposed of the scienter requirement by saying: "In our view, the scienter required is established by appellant's knowledge as the writer of the letters, that they were obscene within the meaning of section 1461 when construed according to the standard declared in Roth."[24] It is the view of the author that the court did not mean that a person must be aware of the fact that the matter was obscene. This point is too well settled by all prior cases to allow such an interpretation at this time, but the language is none the less interesting. This case will be discussed in a later section dealing with the "average person" standard.

Another problem which the courts have faced has been that of the motive of the accused. One early case to deal with the problem involved a Deadwood, S.D., newspaperman who was accused of publishing and mailing an obscene newspaper. The editorial scourged society for its views on premarital relationships. The court recognized his good motive and sincerity but held:

> His motive may have been never so pure; if the paper he mailed was obscene, he is guilty. There is no reference in the statute to the design or intent that a man has in depositing nonmailable matter in the mail. He cannot violate the law even though his purpose be to accomplish good.[25]

It is evident that Anthony Comstock had pushed "the last frontier" farther West than Deadwood, S.D., when the law concerned itself with "lewd" editorials about young girls in trouble. Nine years later the ninth circuit court sustained a lower court's ruling that

[20] United States v. Schindler, 208 F.2d 289 (9th Cir. 1953).
[21] *Id.* at 290.
[22] *Ibid.*
[23] 361 U.S. 147 (1959).
[24] United States v. Ackerman, 293 F.2d 449, 454 (9th Cir. 1961).
[25] Knowles v. United States, 170 Fed. 409, 411 (8th Cir. 1909).

questions put to the defendants concerning their motives were inadmissible as immaterial. [26]

Probably the most famous case on the question of motive is the *Dennatt* case.[27] The accused felt that her sons were lacking in a proper understanding of the facts of life so she wrote a little pamphlet to point out the true outlook on sexual matters. So successful was the attempt that she began selling the pamphlets through the mail for $.25 each. Prosecution soon followed. The court held the contents of the pamphlets *not* to be obscene; but on the question of the author's obviously pure motive, Judge Augustus Hand, speaking for the court, said:

> It is doubtless true that the personal motive of the defendant is distributing her pamphlet could have no bearing on the question whether she violated the law. Her own belief that a really obscene pamphlet would pay the price for its obscenity by means of intrinsic merits would leave her as much as ever under the ban of the statute.[28]

A 1950 case specifically applied the general rule as to motive to private communication.[29] This was a prosecution under 18 U.S.C. § 1461 for mailing lewd and obscene letters to two strangers. The court referred to the *Dennatt* case and held that the motive of the defendant was immaterial. Another recent case involving a vile letter sent to the accused's girl friend again emphasizes the court's complete disapproval of any reference to the accused's motive.[30] The defendant claimed that the letter was motivated by anger and not by lust or perversion. The court held this contention was of no merit.[31] A similar case arose in the sixth circuit and the motive question was again disposed of in short order.[32]

To attack the application of the statute to private correspondence the grounds of scienter and motive is now a fruitless exercise of theoretical reasoning. The questions are too well settled. If a person deposits an item in the mail knowing its contents, he has met the requirements of scienter under the statute. If the matter is found to be obscene, the motive of the sender is immaterial.

[26] Magon v. United States, 248 Fed. 201 (9th Cir. 1918).
[27] United States v. Dennett, 39 F.2d 564 (2d Cir. 1930).
[28] *Id.* at 568.
[29] Verner v. United States, 183 F.2d 184 (9th Cir. 1950).
[30] Cain v. United States, 274 F.2d 598 (5th Cir. 1960).
[31] *Ibid.*
[32] Thomas v. United States, 262 F.2d 844 (6th Cir. 1959).

Consequently, any limitation of the statute's application to private correspondence must lie in the question of what standard is to apply. The courts already have been faced with this issue.[33]

IV. THE SEARCH FOR A STANDARD

The standard to be applied to private handwritten communications addressed to a specific person has become important in light of the standard announced in the *Roth* case which held that 18 U.S.C. § 1461 was constitutional when the proper test was applied. Before the Court's holding in the above case, the lower federal courts had dealt in many different ways with the problem of what standard to apply to such matters. Two early cases demonstrate the confusion that existed prior to the *Roth* case. The case of *United States v. Wroblenski*[34] concerned a letter sent by a son to his mother accusing her of adulterous intercourse with a son-in-law. The court pointed out that such a letter is under the purview of the statute but had this to say concerning the standard to be applied to judge its obscene nature:

> The language or communication may be free from the condemnation of the statute in one instance, while it would clearly fall within it when addressed to other persons. So the inquiry as to the tendency of the letter must be narrowed to its liability to corrupt the addressee, and no such tendency can be imputed to this letter to the mother of the defendant.[35]

In a later case, a husband sent an allegedly obscene letter to his wife.[36] The court rejected the standard set out in the above case and held:

> It matters not what the relationship between sender and sendee is, or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try the case, have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute.[37]

However, a 1950 case may have returned to the standard of the effect on the addressee.[38] The court said, "The letters were nonmailable material if they had a tendency to deprave or corrupt the morals of those who would receive them."[39]

The only Supreme Court case touching the matter in this period was *United States v. Limehouse*.[40] In that opinion, Justice Brandeis cites the case of *Swearingen v. United States*,[41] and quotes

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[33] United States v. 31 Photographs, 156 F. Supp. 350 (S.D. N.Y. 1957).
[34] 118 Fed. 495 (E.D. Wis. 1902).
[35] *Id.* at 496.
[36] United States v. Musgrave, 160 Fed. 700 (E.D. Ark. 1908).
[37] *Id.* at 706.
[38] Verner v. United States, *supra* note 28.
[39] *Id.* at 185.
[40] 285 U.S. 424 (1932).
[41] 161 U.S. 446 (1896).

the wording of the Court that language must be "calculated to corrupt and debauch the mind and morals of those into whose hands it might fall."[42] Unfortunately, that case cannot be considered a standard setting case because the main thrust of the opinion was aimed at a definition of the word "filthy." At most, the language is dicta. It must be remembered that throughout this period the courts were struggling with the broader problem of defining obscenity itself, an area this paper is not specifically concerned with. The conflict among the lower courts set the stage for the definition enunciated in the *Roth* case. The test was, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken, as a whole appeals to the prurient interests."[43] Our purpose now is to determine whether a private letter is properly to be held to this standard.

The Court, in adopting its now famous "test," borrowed the definition formulated by the drafters of the Model Penal Code.[44] It must be noted that the drafters also defined what would be non-criminal dissemination stating that "dissemination not for gain, to personal associates other than children under sixteen"[45] was non-criminal. In the comments on this section it is stated: "The illogic of making private circulation of obscenity criminal can be seen in relation to a case where the man writes sexual proposals, of an admittedly obscene character, to a woman who welcomes such correspondence, his mistress for example."[46]

This is in itself an extreme position which is worthy of deeper study but which is beyond the scope of the present article.. However, the point is important to show that the private letter problem is being studied. With this in mind the basic problem presents itself. Should private letters which are not sent for gain or in an indiscriminate fashion be held to the same standard as books, magazines, and other publications aimed at a mass audience? The arguments which follow are based on a belief that private letters between parties acquainted with one another whether personally or through past dealings should not be judged by the "average man" test. Of course, private letters which are indiscriminately sent to offend the recipients are not worthy of protection.[47] These would include "crank" letters and letters sent as a method of release for the mentally immature.

V. The Case for Variable Obscenity

The leading proponents of the variable obscenity standard are Professors William B. Lockhart and Robert C. McClure of the University of Minnesota Law School. They present a very persuasive argument for an approach more flexible than the *Roth* test in their article, *Censorship of Obscenity: The Developing Constitutional*

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[42] *Id.* at 451.
[43] Roth v. United States, *supra* note 2, at 489.
[44] *Supra* note 4.
[45] *Id.* at 3.
[46] *Id.* at 16, 17.
[47] Paul and Schwartz, *Obscenity in the Mails: A Comment on Some Problems of Federal Censorship*, 106 U. Pa. L. Rev. 214, 239-244 (1958).

Standards.[48] They point out that a variable obscenity standard would hold that nothing is obscene on its face but only is obscene in its effect.[49] They argue for a standard uniformly applied. This author feels that since obscene matters are as varied as the imagination of man can make them, that uniformity may not really be desirable. A line should be drawn between the test applied to a private letter writer and that applied to the commercial exploiter. The *Roth* case has set out the standard for the purveyor; need this be the standard for all allegedly obscene matter? The variable obscenity standard would judge material by its appeal to and effect upon the audience to which it is primarily directed.[50] The test requires a determination of the primary audience and then the creation of a hypothetical person typical of the audience.[51] Following the prurient interest test formulated in the *Roth* case, the material would be judged obscene only if it appealed to the prurient interest of the typical person of the primary audience to which the matter is directed. The application of this test to the private correspondence situation would necessarily require the matter to appeal to the prurient interests of the addressee. It is the purpose of this article to point out the reasons why the variable obscenity test should in fact be the standard.

The *Roth* standard in its application has not been free from attacks by the courts themselves. What might be called the "perfect case" to illustrate the fallacy in trying to apply the *Roth* test arose under the sister statute to 18 U.S.C. § 1461 which makes unlawful the importation of obscene material from any foreign country.[52] The Kinsey Institute sought to import thirty-one photographs and other examples of foreign pornography for use in research. The government sought to suppress the photos.[53] Judge Palmieri granted the Institute's motion for summary judgment. He was faced with the paradox of finding something obscene under the "average person" test when it was to be seen only by a group of scientists who in all probability would not even be aware that their prurient interests were being appealed to. In discussing the *Roth* standard, Judge Palmieri said:

> But the search for a definition does not end there. To whose prurient interest must the work appeal? While the rule is often stated in terms of the appeal of the material to the "average person," [citation omitted] it must be borne in mind that the cases applying the standard in this manner do so in regard to material which is to be distributed to the public at large. I believe, however, that the more inclusive statement of the definition is that which judges the material by its appeal to "all those whom it is likely to reach." [Citation omitted.] Viewed in this light, the "average man" test is but a particular application of the rule, often found in the cases only because the cases often

[48] 45 MINN. L. REV. 5, 77-88 (1960).
[49] *Id.* at 77.
[50] *Ibid.*
[51] *Id.* at 78-79.
[52] 19 U.S.C. § 1305.
[53] *Supra* note 32.

deal with material which is distributed to the public at large.[54]

The problem raised by this case is essentially the same as arises when the *Roth* standard is used when a private letter is alleged to be obscene. Although Judge Palmieri did not state the variable obscenity test in so many words, he did in effect apply the test.

Attorneys for the government are aware of the difficulties in applying the "average man" test to private letters. This is made plain by a military court-martial case[55] which involved letters

[54] *Id.* at 354-355. (Footnotes of Court omitted.)
[55] United States v. Holt, 31 C.M.R. 57 (1961).

written to a thirteen year old girl by the defendant, age thirty-one, who was married but separated from his wife. The two had become intimate and the letters were saved by the girl only to be discovered and brought to light by the girl's mother. The defendant was charged with carnal knowledge in violation of Article 120 and three specifications of mailing obscene letters in violation of Article 134 under the military code. The court apparently applied the variable obscenity test but found that the letters would be obscene no matter what test was applied.[56] The court mentions in a footnote that the government conceded that the "average person" test was inapplicable, but felt the question need not be decided because the letters were, in effect, obscene per se.[57] It has been pointed out, however, that this is an error since the argument by the government was in the alternative.[58] The court did not feel obliged to apply any standard, but it is this author's contention that a strict application of the variable obscenity test may have necessitated a different result.

To review, a letter to be obscene under this test must be found to appeal to the prurient interests of the recipient. The girl herself testified that she considered the letters "just [the accused's] way of saying things."[59] I believe the court did not give sufficient weight to such testimony; certainly the relationship was sordid but this is a distinct question and should not have a bearing on the question of the obscenity of the letters. The question remains, did the letters appeal to the prurient interests of the recipient, or were they merely expressions of desire expressed in terms not the most delicate but understood by both to be ordinary and normal? The court simply stated that the letters were obscene by whatever standard applied.[60] The court, therefore, held that the letters were obscene as far as the court was concerned without any reference to the effect on the girl. This is not an application of the variable obscenity test, nor in fact, is it an application of any standard so far announced, unless it be that the letters had a tendency to appeal to the prurient interests of the court itself. Referring to the comment by the drafters of the Model Penal Code one who enjoys this type of communication should not be liable to criminal sanctions without at least a showing of an appeal to the prurient interests of the recipient.[61] The case remains valuable for one reason, that being the indication that the government is aware of the difficulty of applying the average person test to private letters, particularly where there is an element of mutual sentiment between the parties, and even more particularly where the recipient was not offended but a member of her family the complainant was offended.

If this paper could be concluded at this point, the task of the author in attempting to show that the "average person" test should not be applied to private correspondence would be met by a showing of the problem involved. However, a federal court of appeals recently

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[56] *Id.* at 59.
[57] *Id.* at 58, footnote 2.
[58] Zuckman, *The Law of Obscenity and Military Practice*, 20 MIL. L. REV. 43, 52, footnote 42 (1963).
[59] *Supra* note 54, at 58.
[60] *Id.* at 59.
[61] *Supra* note 4.

applied the "average person" test to just such a situation.[62] The task now becomes one of attempting to answer the objections to the variable obscenity test set out in the opinion. The case involved letters written by a man who apparently was a published author of works on homosexuality to a person he believed to be a lesbian. His admitted purpose was to gain some insight into this subworld of life. The recipient was in fact not a lesbian but a married man, aged thirty-eight, and the father of two children. The defendant was convicted and he appealed; the conviction was affirmed. The defendant alleged that the *Roth* standard was inapplicable to private letters. The court disposed of this contention and gave three reasons.[63] The first reason was that the mailing of private letters by cranks and crackpots would be facilitated since the obscene character would depend on the reaction of the addressees. This is simply not true. The variable obscenity test would force letters indiscriminately mailed to be judged by their effect on the community of the recipient, *i.e.*, a girls school or a women's club. One letter sent by a crank would be judged on its effect on the individual recipient. If it is capable of appealing to the prurient interests of the recipient, it is obscene; but if it is not, criminal prosecution seems unjustified. The court next points out that some writers of obscene letters would escape prosecution. The point of the variable obscenity test is that a writing is *not* obscene, until a standard is applied and the issue submitted to the finder of fact for its determination. The court placed the cart before the horse in saying that a letter could be obscene without the application of any standard. If the letter appeals to the prurient interests of the recipient, it is obscene but not before. Finally, the court points out that well-intentioned letter writers would possibly find themselves liable for writing a letter which is later found to be obscene. Unfortunately, the question of motive has been so strongly held not to be an issue in prosecution under this statute, that a result such as this is possible. But we must look at the possible results under a strict application of the Roth standard. An equally well-intentioned letter writer who writes a letter in language he knows or has reason to believe would not appeal to the prurient interests of the recipient finds his criminal liability judged on the reaction of an "average man" who very possibly is quite a different person from his addressee. The point is that a writer of a potentially obscene letter would have a much truer yardstick by which to gauge his possible guilt if the recipient's reaction is to be the test, rather than that of a mythical man in a mythical community. One cannot help but wonder if the court was unaware of another possible result. A highly educated man could write a letter to an equally well-educated woman in terms which would appeal to her prurient interests but the very same terms would not appeal to the same interests of our friend the "average person" in the community since he could not be said to understand them. Here is hard core pornography on a high level escaping the constrictures of the statute.[64]

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[62] Ackerman v. United States, 293 F.2d 449 (9th Cir. 1961).

[63] *Id.* at 453.

[64] United States v. Darnell, 316 F.2d 813, 820 (2d Cir. 1963). (Judge Moore dissenting.)

A final case should be mentioned at this point. The case is *United States v. Darnell*[65] which involved a letter written to a woman by a man of her acquaintance informing her of facts tending to show that her husband was a homosexual and an adulteror. The letter was written in three and four letter words and not in the most delicate fashion. The court sustained a conviction stating:

> This is a result which we cannot view with satisfaction, since a private communication only brought to light by the addressee would hardly seem to merit criminal prosecution, particularly when it involves merely use of coarse language for which the writer could have substituted more refined phraseology, had he been so minded.[66]

No indication is given of what standard was applied although the *Roth* case is cited as requiring the decision. Here is a perfect case for the application of the standard contended for by this paper. The jury or the judge, as the case may be, should determine from the evidence presented whether the letter appealed to the prurient interests of the woman recipient.

The dissenting opinion by Judge Moore is a classic example of the method of argument known as *reductio ad absurdum*. He does not contend that a different standard should be applied but feels the very idea of criminal prosecution for such a letter giving information in unfortunate terms is not only absurd but dangerous.[67] He points out an idea, mentioned earlier in this paper, that this was possibly the only language the woman would understand and probably the only language the defendant knew how to use. The letter was informational in its nature. Does this cause it to appeal to the prurient interests of the recipient, or does it cause merely anger and distress? The prurient interests of the recipient should be the test. If that had been applied to this case the result probably would have been different.

Aside from the need of application of the variable obscenity test to letters of this nature the author cannot help but agree with Judge Moore when he says in reference to the total concept:

> If revelations of homosexual practices set forth in sealed private letters are to be brought within the purview of the statute, then let it be publicly known that the public writes at its peril and that only that should be written which will pass the ultimate censorship of judges and juries. If true enforcement is to be obtained, the Post Office Department will have to keep steam kettles boiling on a twenty-four hour schedule so that offenders may be apprehended. If this letter, so patently not doing so when read in its entirety, keeping in mind its purpose (quite largely informational), is to be held the means of imposing a criminal conviction upon this young man, then we really have cause for worry. "1984" and "Big Brother" are already here.[68]

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[65] *Ibid.*
[66] *Id.* at 814.
[67] *Id.* at 814-820.
[68] *Id.* at 820.

STUDY OF CIRCUMVENTION: THE ENFORCIBILITY OF "BROWN"

BY HUGH WM. FLEISCHER*

I. INTRODUCTION

An historic and vital opinion was rendered by the United States Supreme Court on May 17, 1954. *Brown v. Board of Education of Topeka, Kansas*[1] has had and undoubtedly will continue to have a monumental effect upon the lives of millions of Americans. This decision announced that an established practice and, indeed, attitude of a large segment of this country are contrary to the Constitution of the United States. The Supreme Court, in deciding state-enforced public school segregation to be unconstitutional, took cognizance of the fact that there were to be manifold problems of enforcibility of this decision. In the second *Brown* decision,[2] the Court stated that: "Full implementation of these constitutional principles may require solution of varied local school problems,"[3] and decided that the school authorities would have primary responsibility for solving the problems with power vested in the federal district courts to determine whether the actions of the school authorities constitute good faith implementation of the constitutional duty to end racial discrimination in the public schools.

The purpose of this paper is to provide an analysis of the problems involved in the enforcement of the *Brown* decision insofar as these problems are created by recognized officials of the state governments. The majority of these problems are not administrative but arise out of the belief on the part of elected officials and others who work under the auspices of the southern state governments that the *Brown* decision is legally and morally wrong. This is illustrated in a statement signed by seventeen United States Senators and seventy-seven United States Representatives: "We commend the motives of those States which have declared the intention to resist forced integration by any lawful means."[4]

The obstacles to school desegregation established by southern officialdom cover a wide spectrum ranging from resistance by legislative enactment to the subtle harassments of administrative proceedings. In addition to illustrating the various means used to resist the *Brown* decision, the action taken by the respective federal district courts and the federal courts of appeals in response to these resistance measures will be analyzed. The scope of the discussion will not include the manifold societal and economic instruments which have been used to stifle the effectiveness of the *Brown* decision.[5]

The statistics of recent years clearly indicate that the resistance

* June graduate, University of Denver College of Law.

[1] 347 U.S. 483 (1954).

[2] Brown v. Board of Educ. of Topeka, 349 U.S. 294 (1955).

[3] *Id.* at 299.

[4] ERWIN, *Declaration of Constitutional Principles*, DESEGREGATION AND THE SUPREME COURT 103 (Ziegler ed. 1958).

[5] See generally GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959).

measures have enjoyed no little success. As of 1958 there were seven states which did not have a single desegregated school district and three more states which had an almost negligible degree of desegregation.[6] In 1964 the numbers of Negroes in school with whites in southern states and the percentages of total Negro enrollments are as follows:

State	Number of Negroes in Integrated Schools	Percentage of Negroes in Integrated Schools in Relation to Total Negro Enrollment[7]
Alabama	11	.004%
Arkansas	1,084	.968
Florida	3,650	1.53
Georgia	177	.052
Louisiana	1,814	.602
Mississippi	None	.000
North Carolina	1,865	.538
South Carolina	10	.004
Tennessee	4,446	2.71
Texas	14,000 (approx.)	4.29
Virginia	3,721	1.57

In these eleven states the policies of official resistance have played a prominent role; therefore the bulk of this paper will be concerned with the activities in these southern states.[8]

II. DEFIANCE MEASURES

The first and most prominent resistance measure undertaken by some southern state governments was that of the interposition statute. This statute says, in essence, that the state may interpose its sovereignty against that of the Supreme Court of the United States. The prominence of this measure quickly vanished, however, when confronted with a federal court action. In one of the few cases which made more than mention of the interposition statute, the court rather decisively said, ". . . interposition is not a *constitutional* doctrine. If taken seriously, it is illegal defiance of constitutional authority." [9] Most of the federal courts which have considered state statutes incorporating the interposition doctrine have felt that the doctrine did not have sufficient legal validity to warrant discussion. One federal district judge branded the interposition resolution "an escape valve through which the legislators blew off steam to relieve their tensions."[10] The Supreme Court, in considering the issues that had arisen in Little Rock, Arkansas, made a restatement of basic principles in answer to the interposition statute and similar measures.[11] The Court stated that the Constitution is the "Supreme Law of the Land" and that the Supreme Court has the established right to interpret the Constitution so as to make the

[6] Southern School News, Feb. 1958.
[7] New York Times Western Edition, Jan. 20, 1964, p. 15, col. 5.
[8] Southern School News, Sept. 1954.
[9] Rush v. Orleans Parish School B'd, 188 F. Supp. 916, 926 (E.D. La. 1960).
[10] Shuttlesworth v. Birmingham B'd of Educ., 162 F. Supp. 372, 381 (N.D. Ala. 1958).
[11] Cooper v. Aaron, 358 U.S. 1 (1958).

Brown decision the "Supreme Law . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding."[12]

Another group of laws enacted by most of the southern states were the measures requiring the immediate closing of schools upon the desegregation of those schools.[13] The most notorious plan for school closing was that of the Commonwealth of Virginia,[14] a plan declared unconstitutional by a federal district court in *James v. Almond*[15] and in violation of the Virginia Constitution by the Virginia Supreme Court of Appeals.[16] In the case of *James v. Almond*, the district court reasoned:

> Virginia, having accepted and assumed the responsibility of maintaining and operating public schools, cannot act through one of its officers to close one or more public schools . . . [because of enrollment of Negroes] . . . and, at the same time, keep other public schools throughout the state open on a segregated basis.[17]

Hence the court predicated its holding on the fact that the state exercised control over the schools. When the district court rendered this decision there was no question as to the exercise of control over the schools, in that Virginia had assumed the operation of all of the schools in the state through the so-called "massive resistance" legislation,[18] which included an elaborate scheme to establish "private" segregated schools. Benjamin Muse, a Virginian and former Republican gubernatorial candidate, remarked, "A sacrifice of public education, extremists believed would show to the world the depth of Virginia's resentment of the Supreme Court's 'intrusion'."[19] The Virginia Supreme Court of Appeals, in *Harrison v. Day*,[20] decided the school closing to be invalid, basing its decision upon the violation of the state constitutional requirements to "maintain an efficient system of public free schools throughout the

[12] U.S. CONST. art. VI § 2.
[13] See generally PELTASON, FIFTY-EIGHT LONELY MEN 193-197 (1961).
[14] VA. CODE ANN. §§ 22-188.3 to 188.15 (Supp. 1958).
[15] 170 F. Supp. 331 (E.D. Va. 1959).
[16] Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959).
[17] 170 F. Supp. 331, 337 (E.D. Va. 1959).
[18] MUSE, VIRGINIA'S MASSIVE RESISTANCE, p. 53 (1961).
[19] *Ibid.*
[20] *Supra* note 16.

State."[21] In one of the last reported of a succession of cases dealing with the Prince Edward County school closing situation,[22] which has seen the schools of that county closed for more than four years, the federal district court in *Allen v. County School B'd*[23] refused to accept the county school board's argument that the board was an autonomous unit. This argument, had it been accepted, would have skillfully avoided the doctrine of *James v. Almond,* which requires that there be state control to allow the federal court to invalidate a limited school closing. The court looked to those sections of the Virginia Constitution which relate to the state support of schools and arrived at the conclusion that the local board operated the schools in conjunction with the state instrumentalities and operated under standards and practices maintained by the state so that the closing of the Prince Edward County schools was in contravention of the principles stated in *James v. Almond.* It would appear as a result of the *Allen v. County School B'd* decision that almost any degree of control exercised over the schools by the state will bring the reasoning of *James v. Almond* into effect. The district court arrived at the conclusion that state control existed on the basis of such factors as: partial appropriation from the general assembly, state constitutional provisions for the appointment and duties of a superintendent of public instruction and of a state board of education and, also, the fact that school text books, minimum teachers' salaries and many other school procedures are governed by state law.[24]

The teaching of these cases is that a state wishing to close a school system which has been forced to desegregate must either close all of the schools in the state, a situation which seems hardly plausible in the twentieth century,[25] or completely divorce itself from the operation of those closed school districts in virtually every respect. Such an estrangement, as a practical matter, might be impossible to achieve considering first the desire on the part of the states to exercise control over the operation of its schools and, secondly, the economic facts of life which would beseige the vast majority of southern school districts if faced with the problem

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[21] VA. CONST. art. IX § 129.

[22] The federal court of appeals decided that the federal district court should have abstained to await state court determination of the validity of the public school closing in Prince Edward County. Griffin v. Board of Supervisors of Prince Edward County, 322 F.2d 332 (4th Cir. 1963). The Supreme Court of Appeals of Virginia had held that the Virginia Constitution did not compel the state to reopen public schools in Prince Edward County. County School B'd of Prince Edward County v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963). The Supreme Court of United States invoked its power to hear the case on its merits without waiting for final action by the court of appeals. Griffin v. County School B'd of Prince Edward County, 32 U.S.L. WEEK 3216 (U.S. Dec. 10, 1963) (No.. 592). The Supreme Court decided that the Prince Edward County school closing was violative of the "Equal Protection Clause" of the fourteenth amendment and allowed the district court to order a reopening of the schools if necessary. Griffin v. County School B'd of Prince Edward County, 32 U.S.L. WEEK 4413 (U.S. May 26, 1964).

[23] Allen v. County School B'd of Prince Edward County, 207 F. Supp. 349 (E.D. Va. 1962).

[24] *Id.* at 352.

[25] See 1961 COM'N ON CIVIL RIGHTS REP. ch. 12.

of financing operations without state support. At the same time, when one considers the almost inconceivable extremes to which some state legislatures have gone in attempts to avoid the desegregation of their schools it becomes less difficult to imagine a state sanctioning a complete school shutdown.

One of the most notable examples of drastic measures was that passed by the Louisiana Legislature and ruled unconstitutional by the federal district court.[26] In part, the measure provided that any school under an order to desegregate was to be immediately closed, whereupon the school board ceased to exist; to effectuate these directives, by force if necessary, the state police were given additional powers and placed under the orders of the legislature and it was further provided by statute that, if demonstrators were needed, they could be recruited among the students who were no longer compelled to go to school.[27] One might also consider the strength, in some of the southern states, of such organizations as the White Citizens Council before drawing a conclusion as to the possibility of a state-wide school closing. It has been observed that the White Citizens Council exercises almost complete control over at least one southern state, that of Mississippi.[28]

There are innumerable examples of other "blatant" means used to avoid rules set forth by the segregation cases. Prominent among these means is gerrymandering of school districts. The town of Hillsboro, Ohio, had zoned two separate districts, on opposite ends of the community for its one Negro school, which zoning was decided to be in violation of the fourteenth amendment.[29] Another plan struck down was the application of a brother-sister rule (requiring that any child in grades one through six must attend the same school as his older brother or sister) to a school district which had established a stair-step plan of desegregation beginning with the desegragation of the first grade one year and the addition of one succeeding grade in each subsequent year. The court of appeals pointed out the obvious discrepancy between this brother-sister rule and a meaningful program of desegration in that a substantial number of Negro first grade children would be forced to go to segregated schools.[30]

Also, several important and highly publicized cases have dealt with admission to institutions of higher learning. Characteristic of the various plans utilized are their embarrassingly unsophisticated methods. A Louisiana statute which required a high school principal to attest to the good moral character of the prospective college student was applied so that Negro high schools were furnished certificates addressed only to Negro colleges. This application of

[26] Bush v. Orleans Parish School B'd, *supra* note 9.

[27] *Id.* at 928.

[28] Carter, *Citadel of the Citizens Council*, N. Y. Times, Nov. 12, 1961 (Magazine), p. 23.

[29] Clemons v. Board of Educ. of Hillsboro, Ohio, 228 F.2d 853 (6th Cir. 1956). More subtle means of gerrymandering or some semblance thereof are found in Taylor v. Board of Educ. of New Rochelle, 294 F.2d 36 (2d Cir. 1961) and Evans v. Buchanan, 207 F. Supp. 820 (D. Del. 1962) in which the court found that an all-Negro school having a separate administration and being surrounded by white districts was the basis for a discrimination finding.

[30] Ross v. Dyer, 312 F.2d 191 (5th Cr. 1963).

the statute was found to be unacceptable.[31] A requirement, reminiscent of the "grandfather clause," that an applicant to a university or college forward a recommendation by one or more alumni of the institution met its demise in one district court with these words, "The effect . . . has been, is, and will be, to prevent Negroes from meeting this admission requirement."[32] Another case agreed—some three years later, in the course of extended litigation[33] which was to bring James Meredith to the University of Mississippi as the first known member of his race to enter a "white" school in that state. The court held that the alumni certificate requirement, ". . . is a heavy burden on qualified Negro students, because of their race."[34] The court also took judicial notice of the fact that the requirement was enacted a few months after the *Brown* decision had been rendered. The Meredith litigation seems clearly to indicate the degree of difficulty which lies ahead for Negroes in their full realization of non-segregated school systems. One must not overlook the fact that the obstacles presented to the plaintiff, Meredith, were devised and implemented by the highest officials of education in the State of Mississippi.[35] In one instance the court of appeals remarked, in response to allegations and tactics used by the state officials, that "his case was tried below and argued here in the eerie atmosphere of never-never land."[36]

There was also comment made as to the lack of fairness which Meredith received in the federal district court. The court of appeals looked to the fact that ". . . the counsel for the defendants was allowed so much latitude while at the same time counsel for the plaintiff was so severely circumscribed in the examination of witnesses, introduction of evidence and argument . . ."[37]

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[31] Board of Supervisors v. Ludley, 252 F.2d 372 (5th Cir. 1958).

[32] Hunt v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959).

[33] Delays caused the Meredith case to carry through the February term, two summer terms and the regular terms of 1961-1962. Meredith v. Fair, 305 F.2d 343 (5th Cir. 1962).

[34] Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962).

[35] The reasons promoted by the University in its rejection of the application submitted by Meredith were as follows: a) Overcrowding of dormitories. The court found that there were 400-500 less than the number of males the previous semester.

b) Non-recognition of the school which Meredith was then attending. It was found that this school was supervised by the same trustees as those at the University of Mississippi. It is also interesting to note the ironic change of official attitude toward Negro schools from the day when the general pronouncements were as to the separate equality of Negro education.

c) Alleged false voting registration. This allegation was termed by the Court of Appeals of the Fifth Circuit, ". . . a frivolous defense."

d) Meredith accused of being a troublemaker. The data upon which this accusation was based were excerpts from admittedly incomplete Air Force records, and the court stated that "One short answer to the defendants' contention is the Good Conduct Medal."

e) Bad characer risk charge. It was decided that this assertion represented "scraping the bottom of the barrel."

The court concluded in these words: "Reading the 1350 pages in the record as a whole, we find that James Meredith's application for transfer to the University of Mississippi was turned down solely because he was a Negro." Meredith v. Fair, *supra* note 34.

[36] Meredith v. Fair, *supra* note 34.

[37] *Ibid.*

III. School Board Tactics

One strategy that has gained wide acceptance among school boards and sometimes used while maintaining the outward appearance of "good faith" action is delay. School boards may take the position, as has been taken by Governor George Wallace of Alabama,[38] that the *Brown* case binds only the specific parties before the Court and that non-action on the part of other school boards which have not been specifically enjoined is perfectly constitutional.

The matter of delay in the implementation of school desegration has reached the Supreme Court.[39] The Little Rock School Board requested a delay on the basis of widespread public hostility which caused tension and unrest. The Court refused to grant such a postponement, while recognizing the good faith of the board and the fact that educational progress would continue to suffer under the then existing circumstances. The Court decided that unrest engendered by official actions of the governor and the Arkansas Legislature could not be valid basis for a delay in desegregation.[40]

The Supreme Court discussed the matter of delay in more general terms in the second *Brown* decision,[41] saying that disagreement with the constitutional principles would not be an accepted basis for delay. The Court also set down those problems which might be validly considered by the courts in their determination of whether additional time was warranted. These problems included administration, physical limitations of the school, transportation, personnel, revision of districts, and revision of local laws. However, the Court limited the consideration of these problems to a time only after the school board had made a prompt and reasonable start toward full compliance.[42] There have been situations in which the courts have allowed delays based upon administrative difficulties,[43] overcrowding,[44] or school closing elections,[45] but in most cases the boards were making an "actual" effort toward compliance, at least to the degree of having established a tentative plan of initial school desegregation.

Some school boards have refused to act toward some compliance even after a decree has been issued by the district court. In one case, in which the school board had completely failed to act, the district judge granted the school authorities a seven year extension to allow preparation of a desegregation plan. This extension was reversed by the court of appeals.[46] The court made a specific decree that the school board receive and consider applications so that nonracial admittance could be made by a certain date.[47] This decree

[38] Speech by Governor Wallace, University of Denver, Jan. 8, 1964.
[39] Cooper v. Aaron, 358 U.S. 1 (1958).
[40] *Ibid.*
[41] Brown v. Board of Educ. of Topeka, 349 U.S. 294 (1955).
[42] *Ibid.*
[43] Bush v. Orleans Parish School B'd, 308 F.2d 491 (5th Cir. 1962).
[44] Wilburn v. Holland, 155 F. Supp. 419 (W.D. Ky. 1957).
[45] Calhoun v. Members of B'd of Educ., City of Atlanta, 188 F. Supp. 401 (N.D. Ga. 1959).
[46] Allen v. County School B'd of Prince Edward County, 266 F.2d 507 (4th Cir. 1959).
[47] *Ibid.*

was thwarted by the closing of the public schools. The Ft. Worth, Texas, School Board had a stated policy of segregation and for that reason refused to act. The court of appeals stated that an order should be issued categorically abolishing the segregation policy and requiring the board to present a reasonable plan.[48]

In other situations, a board might put forth an ostensible plan which the court feels to be ". . . a speculative possibility wrapped in disuasive qualifications,"[49] or might offer some other type of plan which retains racial factors as principal criteria in the effectuation of that plan. In one such case the court did not invalidate the plan saying, ". . . we are confident that steps will be taken promptly to end the present discriminatory practice . . ."[50] However, more than a year and six months later the same court was forced to say, ". . . our hopes have been disappointed," and the district court mandate that Negroes be admitted was upheld.[51]

The status of the decisions concerning delay appears to be that the courts will enter a specific decree requiring desegregation once it is apparent that a school board has no intention of implementing a meaningful plan. However, as has already been illustrated, it is more than difficult to make a general observation concerning analagous decisions in the field of school segregation. A striking

[48] Potts v. Flax, 313 F.2d 284 (5th Cir. 1963).
[49] Dove v. Parham, 282 F.2d 256 (8th Cir. 1960).
[50] Dodson v. School B'd of City of Charlottesville, Va., 289 F.2d 439 (4th Cir. 1961).
[51] Dillard v. School B'd of City of Charlottesville, Va., 308 F.2d 920 (4th Cir. 1962).

example of the divergency among some of the federal courts in relation to the cases which concern delay is reflected in a recent case where the district court said:

> No plan . . . for general rearrangement of an entire local school system should be required by this or any court without affording to both the school authorities and the public *ample time* for consideration and discussion of alternatives.[52]

This case also provides an example of how the federal judiciary can greatly aid the general dilatory tactics beyond the standardized legal procedures which are admittedly and necessarily slow.

In many rural areas of the South, counties are economically unable to provide more than one high school. By reason of this economic status the progress of integration seemingly has been enhanced when there are Negroes willing to become litigants. In one such case a high school student was required to attend school over fifty miles from his home.[53] It was stated by a district court that "plaintiffs have a legal right to the enjoyment of the opportunities in the county of their residence . . ."[54] It seems clear that such discrimination could not stand up even under the "separate but equal" test when one considers the gross disadvantages that student suffers by either having to live away from home during the school week or having to travel very lengthy distances each day.

The school systems which maintain a patent inequality of academic programs between "white" and "Negro" schools also aid desegregation.[55] Such inequalities provide a tangible violation of the *Brown* decision.

IV. Pupil Assignment Laws

Perhaps the most important facet of the officially sponsored "resistance movement" is an idea drawn from a well-developed practice throughout the country which affords the segregationist or anti-integrationist school board an opportunity to discriminate on a wide scale under the guise of an elaborate set of criteria which are, in essence, divorced from race. Pupil-assignment, or enrollment plans, have been enacted in Alabama, Arkansas, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. The Alabama statute is similar[56] to others

[52] Davis v. Board of School Comm'rs of Mobile County, Ala., 219 F. Supp. 542 (S.D. Ala. 1963). This decision was rendered after the court of appeals had said, in reference to the same case, " . . . the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of the years since the first and second Brown decisions." Davis v. Board of School Comm'rs of Mobile County, Ala., 318 F.2d 63 (5th Cir. 1963). The district court decision was reversed and the Supreme Court refused to stay an order of the court of appeals requiring a plan for immediate desegregation. Board of School Comm'rs of Mobile County, Ala. v. Davis, 84 S. Ct. 10 (1963).

[53] School B'd of Warren County v. Kilby, 259 F.2d 497 (4th Cir. 1958).

[54] Griffith v. Board of Educ. of Yancey County, 186 F. Supp. 511 (W.D. N.C. 1960).

[55] See Mapp v. Board of Educ. of City of Chattanooga, Tenn., 319 F.2d 571 (6th Cir. 1963). The board was, however, merely required to make a study and submit a plan within a reasonable time.

[56] Ala. Code tit. 52 § 61 (4) (1957 Supp.).

and has as its criteria for assignment the following: available room, teaching capacity, transportation, effect of admission of new pupils on established or proposed academic programs, suitability of established curricula for particular pupils, adequacy of pupils' academic preparation for admission, scholastic aptitude and relative intelligence, mental energy or ability of individual pupils, phychological qualification of pupils for type of teaching and associations involved, effect of admission of pupils upon academic progress of others, effect of admission on academic standards, possibility of breaches of the peace or ill will or economic retaliation within the community, possibility of threat of friction or disorder among pupils or others, home environment of the pupil, maintainenance or severance of established social and psychological relationships with other pupils, morals, conduct, health, and personal standards of the pupil, request or consent of parents or guardian and the reasons assigned therefor.[57]

The pupil assignment laws have presented the best answer for those school boards and their respective controlling governments which are intent upon an avoidance of the *Brown* decision. This success has depended upon several factors among which is the virtually insurmountable task which confronts petitioners who wish to challenge such an act "on its face" as an unconstitutional device to thwart school integration. Such an attack was attempted in behalf of his children by the Reverend Fred L. Shuttlesworth, a leading civil rights figure in Alabama.[58] The three-judge federal district court set out the requirements to successfully challenge the constitutionality of an assignment law "on its face." These requirements are:

1. The law must be the source of authority by virtue of which the petitioners are prevented from attending the schools of their choice.
2. There must be a showing that the denial of attendance was based upon race by application of such law.
3. There must be a showing that the entire act is unconstitutional, unless the petitioners can show the exact grounds upon which their denial was based.[59]

Shuttlesworth admitted the validity of some of the criteria listed in the Alabama Pupil Assignment law[60] and it was therefore decided that the petitioners were bound to show, in the face of a strong presumption against unconstitutionality, that the denial was not based upon a valid ground. The court decided that the act was constitutional[61] and this decision was affirmed per curiam by the Supreme Court.[62]

There has been considerable divergency among the courts in dealing with the pupil assignment laws, ranging from a strongly realistic appraisal of the racial situation in the schools, notwith-

[57] GREENBERG, *op. cit. supra* note 5 at 233.
[58] N.C. GEN. STATS. § 115-176 (1960).
[59] Shuttlesworth v. Birmingham B'd of Educ., 162 F. Supp. 372 (N.D. Ala. 1958).
[60] ALA. CODE, *supra* note 56.
[61] Shuttlesworth v. Birmingham B'd of Educ., *supra* note 59.
[62] Shuttlesworth v. Birmingham B'd of Educ., 358 U.S. 101 (1958).

standing the existence of an assignment law,[63] to the relatively narrow interpretation of the "exhaustion of remedies" requirement. It has been decided that the pupil assignment law, in and of itself, does not represent an inconsistency to racial segregation but is merely the legal machinery under which compliance *could* be started so that the principal issue under this reasoning is one of actual steps toward desegregation rather than the constitutional application of the pupil assignment law.[64] This approach, if adopted by more of the district courts, could be thoroughly destructive to the reason for which such laws were enacted. Other courts have required that there be a showing of an unconstitutional application of the assignment laws.[65] The basis for unconstitutional application is usually found in the fact that the initial assignments were made solely on the basis of race,[66] thereby requiring a Negro student who desires attendance at a non-segregated school to apply for a transfer.[67] The Caswell County, North Carolina School Board denied the petitioner's transfer request which was based, in part, on the desire to go to an integrated school regardless of race, creed or color. The school board said, "we cannot assign them on account of race." The court of appeals aptly answered, "A requirement of the School Cases is that transfer applications be not denied on grounds that are racially discriminatory, but a victim of racial discrimination does not disqualify himself for all relief when he complains of it."[68] One court remarked in response to the racially based assignments and collateral transfer requirement that "Negro children cannot be required to apply for that to which they are entitled as a matter of right."[69] It has been decided that the plans whereby criteria are applied only to those students who request a transfer from racially assigned schools are in derogation of the law.[70] Such decision is based upon the factual observation that the only students who request transfers from segregated schools are Negroes.

In many instances the school board has allegedly assigned students on some basis other than race. It has been held that the assignment founded upon some loosely conceived, non-objective possibility is invalid.[71] Factors such as the possibility of threat of friction or disorder among the pupils and others, the possibility of breach of peace or economic retaliation are not justifiable when such factors pertain only to race.[72] One rather strong case deter-

[63] See East Baton Rouge Parish School B'd v. Davis, 287 F.2d 380 (5th Cir. 1961); Gibson v. Board of Public Instruction, Dade County, Fla., 272 F.2d 763 (5th Cir. 1959).

[64] Gibson v. Board of Public Instruction, *supra* note 63.

[65] Green v. School B'd of City of Roanoke, Va., 304 F.2d 118 (4th Cir. 1962); Hamm v. County School B'd of Arlington County, 263 F.2d 226 (4th Cir. 1959).

[66] See Beckett v. School B'd of City of Norfolk, Va., 185 F. Supp. 459 (E.D. Va. 1959), *aff'd sub nom.* Farley v. Turner, 281 F.2d 131 (4th Cir. 1960).

[67] See Wheeler v .Durham City B'd of Educ., 309 F.2d 630 (4th Cir. 1962); Green v. School B'd of City of Roanoke, Va., *supra* note 65.

[68] Jeffers v. Whitley, 309 F.2d 621, 635 (4th Cir. 1962).

[69] Northcross v. Board of Educ. of City of Memphis, Tenn., 302 F.2d 818, 823 (6th Cir. 1962).

[70] Hill v. School B'd of City of Norfolk, Va., 282 F.2d 473 (4th Cir. 1960).

[71] Hamm v. County School B'd of Arlington County, Va., *supra* note 65.

[72] Calhoun v. Members of B'd of Educ., City of Atlanta, 188 F. Supp. 401 (N.D. Ga. 1959).

mined that tests dealing with scholastic aptitude, relative intelligence and the effect of the pupil's admission on academic progress were unacceptable.[73] Naturally, the power to assign pupils to schools "arbitrarily according to whim or caprice . . . [is] legally impermissible, . . ."[74] Hence, it is clear that any obvious discriminatory assignment or any racially based assignment which is made under the guise of a justifiable standard will be struck down with little difficulty. At the same time it can be seen that the school boards have considerable latitude in the application of the assignment laws as is evidenced by the small degree of success made toward desegration in those states which use the pupil assignment laws.

The laws have won the appreciation of some of the federal courts on the foundation that the *Brown* decision has created such varied problems, so many administrative difficulties and such unpredictable solutions ". . . that courts are not in a position to bar absolutely the use of the Act by a school board sincerely attempting an orderly transition to full desegregation by a fixed date."[75] It seems fair to say, though, that once a school board has indicated its insincerity in one way or another the courts should no longer allow an absolute application of the pupil assignment laws, in that the placement principles ". . . serve only in subordinancy or adjunctiveness to the task of getting rid of the imposed segregation situation."[76]

One recent breakthrough in the area of transfer provisions was brought about by a Supreme Court ruling on a Knoxville, Tennessee, plan which allowed a student to transfer, upon his request, if the student would otherwise be required to attend a school where

[73] Davis v. Board of Educ. of Charleston Consolidated School Dist., 216 F. Supp. 295 (E.D. Mo. 1963).

[74] Orleans Parish School B'd v. Bush, 242 F.2d 156, 165 (5th Cir. 1957).

[75] Bush v. Orleans Parish School B'd, 308 F.2d 491, 501 (5th Cir. 1962).

[76] Dove v. Parham, 282 F.2d 256, 259 (8th Cir. 1960).

the majority of students were of a different race. The Court decided this provision to be unconstitutional, stating that ". . . no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."[77]

The major tacts taken by the courts when confronted with a recalcitrant school board have been: the injunction against discriminatory practices to be effective until the board submits a suitable plan for ending discrimination;[78] a threat to allow the petitioners and all similarly situated to enter schools on a nonsegregated basis unless the board submitted a plan to end the existing practices with all deliberate speed;[79] the injunction issued for transfer or initial assignment to a school attended solely or largely by pupils of the other race if the board follows the practice of assignment based upon race.[80] It can be seen that the courts have been pushed to the point of having to use forceful threats to achieve some degree of compliance with the law.

V. Exhaustion of Remedies

One of the important problems related to some of the pupil assignment laws and the one which has caused an almost stultifying effect to school desegregation in North Carolina is that of the "exhaustion of remedies" requirement. Many courts have been willing to look through the facade of administrative remedies and decide that the statutorily required remedies need not be met before bringing action in the federal district court.[81] Certainly, when there is an announced policy of segregation[82] or when it is otherwise apparent that the exhaustion of remedies would be a futile gesture[83] the petitioners need not go through the entire administrative procedure before bringing an action in the federal district court. One case decided that the remedies need not be exhausted when a school board, which had fully integrated its schools so as to grant relief to the plantiffs, proceeded to transfer all white pupils and teachers and administrators so as to reinstate the plaintiffs in a segregated school.[84] The realistic approach of these cases may be contrasted with the Fourth Circuit cases which have dealt with the North Carolina Assignment and Enrollment of Pupils Act.[85] The Fourth Circuit Court of Appeals has decided that in spite of

[77] Goss v. Board of Educ. of City of Knoxville, Tenn., 373 U.S. 683, 689 (1963). The Fourth Circuit Court of Appeals decided the same type of transfer provision to be unconstitutional one year prior to the Goss decision. Dilliard v. School B'd of City of Charlottesville, Va., *supra* note 51.

[78] Wheeler v. Durham City B'd of Educ., *supra* note 67.

[79] Green v. School B'd of City of Roanoke, Va., *supra* note 65.

[80] Jeffers v. Whitley, 309 F.2d 621 (4th Cir. 1962).

[81] See Armstrong v. Board of Educ. of City of Birmingham, 323 F.2d 333 (5th Cir. 1963); Farley v. Turner, *supra* note 66.

[82] School B'd of Charlottesville, Va. v. Allen, 240 F.2d 59 (4th Cir. 1956); Kelly v. Board of Educ. of City of Nashville, 159 F. Supp. 272 (M.D. Tenn. 1958).

[83] Marsh v. County School B'd of Roanoke County, Va., 305 F.2d 94 (4th Cir. 1962); Jackson v. School B'd of City of Lynchburg, Va., 201 F. Supp. 620 (W.D. Va. 1962), *rev'd on other grounds* 308 F.2d 918 (4th Cir. 1962).

[84] McCoy v. Greensboro City B'd of Educ., 283 F.2d 667 (4th Cir. 1960).

[85] N.C. Gen. Stats. § 115-176 (1960).

the fact that a board had made assignments in a racially discriminatory manner, no injunction could issue because there was an individual administrative remedy which must first be exhausted.[86] The court has decided that petitioners who fail to attend investigatory hearings, which are not specifically required by the statute,[87] have not met the administrative requirements.[88] One limiting factor about the North Carolina act is that petitioners will be considered on an individual basis only,[89] so that any victory is necessarily small. The court has placed a special emphasis upon the exhaustion of remedies under this act[90] and requires one to go through the entire process before being enabled to bring a class action in the federal court.[91] One sadly ironic statement made by the court in connection with the exhaustion of remedies, in light of the above illustrations of school board inaction and evasive tactics, was as follows:

> Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge.[92]

The pupil assignment laws and their various requirements remain as one of the chief instruments of the anti-integration forces although some significant inroads have been made toward making these laws more objective and less racially directed in their operation.

VI. DESEGREGATION PLANS

There are communities which have made genuine efforts toward some compliance with the *Brown* decision. Prominent among these communities is Nashville which adopted a twelve year plan for school integration.[93] The first grade is integrated in the first year and each successive year another grade is integrated until all grades through high school are integrated. The court upheld the plan on the basis of empirical evidence and the good faith showing of the school board.[94] On the other hand, the Delaware School Board was disallowed the use of a gradual integration plan and ordered to institute full integration on the following school year.[95] The court compared Delaware with Nashville by noting the presence of the rural, Deep South emotions in Nashville and a larger number of Negroes than in Delaware. The court also said in this respect:

> [I]ntegration in the State of Delaware, which has already integrated many of its schools . . . should not be viewed, gauged or judged by the more restrictive standards reason-

[86] Covington v. Edwards, 264 F.2d 780 (4th Cir. 1959).
[87] N.C. GEN. STATS. § 115-178 (1960).
[88] Holt v. Raleigh City B'd of Educ., 265 F.2d 95 (4th Cir. 1959); McKissick v. Durham City B'd of Educ., 176 F. Supp. 3 (M.D. N.C. 1959).
[89] N.C. GEN. STATS. § 115-176 (1960); Covington v. Edwards, *supra* note 86.
[90] See Carson v. Board of Educ. of McDowell County, 227 F.2d 789 (4th Cir. 1955).
[91] See Covington v. Edwards, *supra* note 86.
[92] Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956).
[93] Kelley v. Board of Educ. of City of Nashville, 270 F.2d 209 (6th Cir. 1959), *cert. denied* 361 U.S. 924 (1959).
[94] *Ibid.*
[95] Evans v. Ennis, 281 F.2d 385 (3rd Cir. 1960).

> ably applicable to communities which have not advanced as far upon the road toward full integration as has Deleware.[96]

It is therefore clear that the plans are going to be judged upon societal factors so that one plan will not necessarily be applicable to another community and one plan which is acceptable for the elementary grades may not be valid for the high school.[97]

The so-called "voluntary" plan has been uniformly invalidated as racially based.[98] The plan sets up three types of school; the white, Negro and integrated. Each child may choose the type of school he wishes to attend, his choice then being enforced mandatorily. It readily can be seen that this plan would not produce any great change in the composition of student bodies in southern communities. One case saw the amazing phenomenon of the district court judge suggesting such a "voluntary plan" rather than the twelve year plan which was offered by the school board. The court rejected the twelve year plan in these words: ". . . the plan submitted by the Board will manifestly lead to an amalgamation of the races . . ."[99] The obstacles to the enforcement of this Supreme Court decision are indeed many.

VII. Conclusion

The factors which are effectively operating to evade school desegregation *in toto* or to a substantial degree are by no means limited to those mentioned in this paper. As was discussed previously, the object of this study was to analyze those means of evasion that are officially endorsed by the state authorized bodies and the regularly elected and appointed officials. There are a wide range of social factors which are extremely influential in discouraging litigants who might wish to bring a desegregation action:

> While threat to job and life is not so strong in border states, in places like Mississippi and Alabama, the risk is very real and few, understandably, are willing to venture it.[100]

Also those private groups or organizations, particularly the N.A.A.C.P., which have been most successful in helping to bring about school desegregation are subjected to almost constant harassment by governmental and private sources in most southern

[96] *Ibid.*

[97] See Moore v. Board of Educ. of Harford County, 152 F. Supp. 114 (D. Md. 1957), *aff'd sub nom.* Slade v. Board of Educ. of Harford County, 252 F.2d 291 (4th Cir 1958).

[98] Boson v. Rippy, 285 F.2d 43 (5th Cir. 1960); Houston Independent School Dist. v. Ross, 282 F.2d 95 (5th Cir. 1960); Kelley v. Board of Educ. of City of Nashville, *supra* note 93.

[99] Borders v. Rippey, 184 F. Supp. 402 (N.D. Tex. 1960). This case had an unusually prolonged history ranging from 1955 through four reversals and one modification until 1961 when federal district court Judge Davidson, by direction of the court of appeals, ordered the twelve year plan into effect, "in disregard of the schools' plans and, constitution and laws of Texas." Borders v. Rippy, 195 F. Supp. 732 (N.D. Tex. 1961).

[100] Letter from Marian E. Wright, staff member, N.A.A.C.P. Legal Defense and Educational Fund, Inc., January 7, 1964. See generally Greenberg, Race Relations and American Law (1959).

states.[101] There is also the problem which has been merely touched upon here, of the inclination and attitude of the district judges, who do have the responsibility for implementation of the *Brown* decision. Considering the strong societal influences which are imposed upon the judges as well as the fact that virtually all of the district court judges are southern born, southern raised and southern educated, it becomes clear that the lack of progress of school desegregation in the South can, in large part, be attributed to the reluctant or antagonistic members of the federal judiciary.[102]

1964 marks the tenth anniversary year of the *Brown* decision; yet because of the continuing influence of the forces that have been here discussed, a substantial majority of southern students continue to attend rigidly segregated schools. In fact, of the 2,901,671 Negro students in the eleven southern states,[103] 98.9 per cent are still in all-Negro schools.[104]

One possible solution to this continual problem of enforced school segregation is the federal Civil Rights Act of 1964 which in pertinent part permits the Attorney General to initiate school desegregation actions in the federal courts at the request of complainants who are unable to maintain appropriate legal proceedings.[105] It is obvious that some new answers are needed. Answers which, possibly, go beyond the limited framework which has heretofore predominated our thinking[106] should be examined carefully. In the tenth year since the *Brown* decision, thoughts should be directed toward full and immediate compliance with the law.

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[101] See generally PELTASON, FIFTY-EIGHT LONELY MEN ch. 3 (1961); BLAUSTEIN & FERGUSON, DESEGREGATION AND THE LAW ch. 15 (1957).

[102] See Stell v. Savannah-Chatham County B'd of Educ., 220 F. Supp. 667 (S.D. Ga. 1963); Davis v. East Baton Rouge Parish School B'd, 214 F. Supp. 624 (E.D. La. 1963), in which Judge West said, " . . . I personally regard the 1954 holding of the United States Supreme Court in the now famous Brown case as one of the truly regrettable decisions of all times."

[103] Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

[104] New York Times Western Edition, Jan. 24, 1964, p. 15, col. 5. See generally Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the U.S., 88th Cong., 1st Sess., ser. 4, pt. 2, at 1509 (1963), statement of Secretary of Health, Education and Welfare, Anthony J. Celebrezze.

[105] H.R. 7708, 88th Cong. 1st Sess. § 307 (1963).

[106] See generally statement by Senator John Sherman Cooper in 34 NOTRE DAME LAW 612 (1959).

BAR BRIEFS

OPINION NO. 30
COLORADO BAR ASSOCIATION
ETHICS COMMITTEE ADOPTED JUNE 6, 1964

SYLLABUS

A lawyer may not use or allow the use of his professional stationery, or other stationery identifying him as a lawyer, in connection with any solicitation on behalf of a charitable or other organization.

FACTS

A lawyers solicits on behalf of a charitable or other organization. As a part of the program of the organization, the lawyer is given a list of names to contact in an attempt to raise money for the organization. The lawyer contacts those persons by mail, soliciting contributions and using his professional stationery or other stationery identifying him as a lawyer.

Is the lawyer in violation of the Canons of Professional Ethics in so doing?

OPINION

In the opinion of the Committee, the lawyer is in violation of Canon 27 (advertising).

The lawyer is in violation of Canon 27 if he uses or allows his professional letterhead, or other stationery identifying him as a lawyer, to be used in the solicitation of funds for a charitable organization or other organization; this is true, no matter what the purpose of the organization. It is improper for a lawyer to so identify himself, since the only apparent purpose of such identification would be to bring his name as a lawyer before the public, or a segment thereof (i.e., advertising). This being the basic reasoning of the Committee, it is not significant whether the lawyer is an officer or a member of the board of directors of the organization.

The Committee believes that a lawyer may not use his stationery for the purpose of writing circular letters. Use of a lawyer's stationery should be confined to correspondence with those with whom he has an established professional or personal relationship. However, even though the Committee believes this to be the better practice, it finds that if the lawyer in the above stated facts had contacted by mail only members of the Bar, such action would not necessarily be improper. The Committee believes that it would be in better taste if the lawyer were to use the stationery of the organization involved or his personal stationery without the designation "Attorney at Law" in making such solicitations even to members of the Bar, and in such a way so that he could not be identified as a lawyer by people who do not know him.

The Committee does not wish to be critical of members of the Bar who in the past inadvertently and without any intent to advertise have indulged in a questionable use of their professional stationery, or other stationery identifying them as lawyers.

OPINION NO. 31
COLORADO BAR ASSOCIATION
ETHICS COMMITTEE ADOPTED JUNE 6, 1964

STATEMENT OF PRINCIPLES
ON PUBLISHED COMMENT CONCERNING PENDING LITIGATION

Canon 20 of the Canons of Professional Ethics reads as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

As good as this statement is, there is abundant evidence that it has not been effective. It has not prevented counsel from holding press conferences or issuing press releases relating to pending or prospective civil or criminal cases. Moreover, as the Canon was drafted before the advent of radio and television, it is limited to newspaper publications. It needs embellishment and implementation.

The very foundation of the administration of justice is that no litigant be deprived of a fair trial. Fair trial presupposes an impartial finder of facts whether judge or jury and for this reason the penalties for "jury tampering" or improperly influencing judges are severe. But bribery or improper approaches to members of a jury out of court are not the only means by which a jury may be improperly influenced. A jury can also be improperly influenced by what they are told in television or radio broadcasts or by what they read in newspapers. This improper influence at times affects civil as well as criminal trials.

No lawyer would be permitted to show a jury a newspaper account prejudicial to one of the parties, yet the same result can be accomplished by the publication in the press of, for example, alleged confessions or the supposed testimony of witnesses which has been excluded by the court.

It is clear that lawyers are responsible for many of the prejudicial statements that appear in the press and are seen or heard on radio and television. The legal profession should not criticize news media for reporting extrajudicial statements made by counsel—statements frequently made with no other purpose than that

they shall be publicized by the news media. We cannot hope to receive the cooperation of the press until we clean our own house.

Members of the bar have a duty to refrain from originating the same types of statements which should not be originated by the press, or otherwise be published. In criminal proceedings, such statements include among others the following:

(1) Any criminal record of the accused.
(2) Any alleged confession or admission of fact bearing upon the guilt of the accused.
(3) Any statement of any public official as to the guilt of the accused.
(4) Any statement of counsel's personal opinion as to the guilt or innocence of the accused.
(5) Any statement that a witness will testify to certain facts.
(6) Any comment upon evidence already introduced.
(7) Any comment as to the credibility of any witness at the trial.
(8) Any statement of matter which has been excluded from evidence by the court at the trial.

In relation to civil proceedings, such types of statements include among others the following:

(1) Any statement of counsel's personal opinion as to the factual or legal merits of the claims of the plaintiff or defendant.
(2) Any statement that a witness will testify to certain facts.
(3) Any comment upon evidence already introduced.
(4) Any comment as to the credibility of any witness at the trial.
(5) Any statement of matter which has been excluded from evidence by the court at the trial.

We hope that this statement of principles on published comment concerning pending litigation will implement and make more understandable the substance of Canon 20.

Trials "are not like elections, to be won through the use of the meetinghall, the radio, and the newspaper." *Craig v. Harney,* 331 U.S. 367, 377. The judicial admonition to jurors to refrain from reading newspapers or listening to radio or television is often an idle gesture. It is only by self-restraint of the kind exemplified by the statements set forth above that meaning can be given to the

constitutional safeguards for a fair trial of which we are so justifiably proud.

It is our hope that by putting our house in order we may set an example of the kind of restraint that should be exercised by the various news media.

OPINION NO. 32
ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JUNE 6, 1964

SYLLABUS

1. When a member of the bar is a candidate for elective office his biography and qualifications may be advertised in newspapers and other advertising media. Such advertising must, however, relate solely to the office which he is seeking; he may not directly or indirectly use the election as a device for calling attention to his professional qualifications as a lawyer.

2. Other lawyers who are not themselves candidates may assist in advertising the qualifications of the candidate, but their names may not be published in newspapers or other advertising media. They may not use professional letterheads in soliciting votes or contributions, nor may they otherwise call attention to their own names or the fact that they are lawyers, except to those with whom they have an established professional or personal relationship.

FACTS

(a) A lawyer is a candidate for elective public office, which may be judicial or otherwise. Those managing his campaign desire to purchase newspaper space and television time to advertise his candidacy. The advertisements will include biographical data and a photograph, and will describe the candidate as a lawyer. May this advertising take place without violating Professional Canon 27?

(b) The campaign manager also desires to organize a committee of twenty leading lawyers for the election of the candidate. (i) He proposes to purchase newspaper advertising listing the twenty lawyers and stating that they endorse the candidate. He also proposes (ii) that each of the twenty lawyers should mail at least 100 letters on his own professional letterhead asking for financial support, and (iii) that a letterhead be printed which will be entitled "The Committee of Twenty Lawyers for the Election of ...." This letterhead will list each of the endorsing lawyers by name, identifying him as a lawyer, and it will be used in making 10,000 direct mail appeals for votes, each of which will be signed by a facsimile signature of one of the lawyers listed. May the twenty lawyers do this without violating Canon 27?

OPINION

(a) The committee is of the opinion that the candidate may advertise his own qualifications for the elective office, one of which is the fact that he is a lawyer.

(b) Each of the steps outlined in paragraph (b) above would necessarily have the effect of advertising the members of the committee, who are not themselves candidates. It is not necessary to create an exception to Canon 27 for this purpose and therefore the committee is of the opinion that each of these steps will violate the canon.

DISCUSSION

1. Activities of the candidate

A candidate for public office is free to advertise his own candidacy, without violating Canon 27, Mich. Op. 74 (1941), A.B.A. Informal Dec. 656 (1963), and these advertisements may state that he is a lawyer, since this is one of his qualifications for office. Similarly he may be identified in television programs as a lawyer. A.B.A. Informal Op. C-230 (b) (1961). Any elaboration of this theme, however, such as a discussion of cases he has handled, is forbidden since this has the effect of advertising not only his candidacy but his legal practice. A.B.A. Informal Op. 546 (1962); Drinker, *Legal Ethic* 248 (1953). For the same reason he may not send out campaign literature on a professional letterhead, Mich. Op. 89 (1945).

2. Activities by other lawyers supporting the candidate

An exception to Canon 27 is afforded to the candidate because the voters must be given full information in order to make an intelligent choice at the polls. The breath of the exception must, however, be limited to what is necessary for that purpose. Plainly there is no necessity that the committee of lawyers endorsing the candidate be advised, or that the voters be informed concerning

their qualifications. There is no objection to an advertisement which is stated to have been purchased by "The Committee of Twenty Lawyers for the Election of X," so long as they are not named. There is likewise no objection to the name of a lawyer appearing in an advertisement listing persons endorsing the candidate so long as such persons are not identified as lawyers.

A committee member may solicit funds upon professional letterheads if the appeal is addressed only to those with whom he has an established professional or personal relationship. If there is to be a mailing to any larger group it is essential that the sender should not be identified in any way as a lawyer and that his professional letterhead should not be used. The "Committee of Lawyers" letterhead will inevitably be sent to some recipients who do not know that all of the twenty persons listed thereon are lawyers, and therefore the use of such letterheads will inevitably have the effect of advertising some of the lawyers listed.

The committee believes that the questions discussed herein are matters of first impression in Colorado and therefore no unfavorable inference should be drawn against any member of the profession who might have acted in a contrary manner during past elections.

OPINION NO. 33
ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED JUNE 6, 1964

SYLLABUS

1. Lawyers may contribute reasonable amounts to the campaign funds of candidates for judicial office, and may solicit contributions from others.

2. A candidate for judicial office may not receive and lawyers may not give any contribution which is excessive in amount or which might justify the inference that the contribution is a device or attempt to gain from a judge his special consideration or favor, in the receipt of appointments from the bench or otherwise.

3. Lawyers may circulate and sign petitions endorsing candidates for judicial office. However, the practice of asking brother lawyers to sign postcards or pamphlets soliciting votes for the candidates, when coupled with a request that such material then be returned to the campaign committee for mailing, violates Judicial Canon 30, even though the candidate may not at the time be a judge. Lawyers who participate in such a breach by the candidate are in violation of Professional Canon 32.

FACTS

A lawyer is a candidate for judicial office. His campaign manager, also a lawyer, desires to make gifts to the candidate's campaign fund, and to solicit others to do so. He also desires to

send postcards to other members of the bar imprinted with a message endorsing the candidate. The other members are instructed to address and sign the postcards and return them to the campaign manager for mailing. The committee has been asked whether either the candidate or his campaign manager is violating any of the canons of professional or judicial ethics.

OPINION

Lawyers have a particular obligation to assist in the selection of well-qualified judges, Professional Canon 2. This must, however, be done in a manner which cannot be construed as an attempt to exert personal influence on the court, Professional Canon 3.

Lawyers may contribute to the campaign funds of judges if the contributions are reasonable in amount and not tainted by any motive of influencing the judge in the administration of his office or in the appointment of receivers, referees, trustees, special masters, and the like. Since a judge may not receive gifts from lawyers, Judicial Canon 32, and they may not make such gifts, Professional Canon 3, such contributions must be given only to a campaign fund managed by others and not to the candidate himself. The committee must itself expend the moneys on his behalf, and no part of the fund may be paid over to the candidate by the committee. Otherwise, the committee serves merely as a conduit for transmitting funds from lawyers to judges.

Lawyers may solicit such contributions from other members of the bar and from the public at large, under the same limitations.

A lawyer may send postcards or pamphlets endorsing the candidacy to those with whom he has an established professional or personal relationship. Distribution to any larger group violates Professional Canon 27 (advertising) if the sender is identified as a lawyer. The campaign manager may not, however, request that the postcards or pamphlets be signed or addressed and then be returned to him for mailing. This practice creates an inference that the candidate or his manager is using the power and prestige of judicial office to promote the candidacy in violation of Judicial Canon 30. Under this canon, the candidate may not permit others to do acts which he himself is forbidden, and the action of the campaign manager is equally unethical, Professional Canon 32. The result is the same even though the candidate may not at the time be a judge. Lawyers should, however, have the moral stamina to resist such coercion.

Since a judge cannot use the power and prestige of his office to promote his own candidacy, he may not send out letters to members of the bar asking for endorsement of his candidacy, A.B.A. Op. 105 (1934); A.B.A. Op. 139 (1935), or solicit his own campaign funds, N.Y. County Op. 304 (1933).

> "Ordinarily a judge should stand on his official record and leave the promotion of his candidacy to others."—A.B.A. 139, (1935) *supra.*

Obviously the candidate and his supporters are under other inhibitions, particularly those imposed by Professional Canons 2, 3, 27 and 32, and by Judicial Canons 4, 12, 13, 14, 24, 26, 28, 30 and 32.

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